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ABSTRACT

This, the first of a series of three publications dealing with the junior college and the courts, summarizes 17 selected case decisions from 1929-70 relating to the authorization and control of the junior college. The cases, treated chronologically, involve private and public colleges. The legal aspects are complex and often in conflict, for the legal bases for education include: (1) constitutions of the various states; (2) constitution of the United States; (3) statutory laws of the states; (4) statutory laws of the national government; (5) decisions of the supreme courts of several states; and (6) decisions of the U.S. supreme court. This work is not intended as a substitute for the professional services of attorneys, but should be used to refer to previous decisions and to stimulate questions about complex legal questions facing the junior college today. Included in this document are the annotated tables of contents for The Junior College and the Courts, Part II: Legal Aspects Concerning Finance and Taxation; and Part III: Legal Aspects Concerning Faculty and Students. (CA)

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# THE JUNIOR COLLEGE AND THE COURTS

## Summaries of Decisions Related to Authorization and Control

## THE JUNIOR COLLEGE AND THE COURTS PART I

## AUTHORIZATION AND CONTROL

UNIVERSITY OF CALIF.
LOS ANGELES

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JC 710 049

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# PREFACE

At no time has the study of the legal problems related to community-junior colleges been of more importance to the academic community than it is at present. Recent years have seen a series of court cases involving these institutions. The legal aspects related to community-junior colleges are most complex because of the fact that there are fifty state systems of education in the United States. Each system is entirely independent of the others and at the same time, practically free from federal supervision and control. The task of reviewing litigation involving community-junior colleges is most challenging, given the condition that the legal bases for education include the constitutions of the various states and of the United States, the statutory laws of the state and national governments, and decisions of the supreme courts of the several states and the United States. Further complications accrue when it is considered that for many years, junior colleges, in many instances, were parts of unified (K-14) school districts.

This book, the first in a series of three, is concerned with the constitutional and legal history of junior colleges in America. An effort has been made to summarize the pivotal facts and law as applied to selected cases during the years 1929 through 1970, related to the authorization and control of these institutions.

The organization of this work has been to trace the legal cases chronologically. Litigation has involved both private and public colleges. One of the earliest legal tests concerning the authorization and establishment of a junior college occurred in Ouachita Parish, Louisiana in 1929. The most recent case relating to control was the United States Court of Appeals decision involving the Marjorie Webster Junior College in the District of Columbia in 1970.

In the space of approximately forty years, seventeen critical court decisions have been rendered involving eleven states and the District of Columbia. All have involved legal questions which have helped to unravel the ambiguity and indefiniteness of various state constitutional and legislative provisions. The year 1970 has witnessed one case reaching the United States Supreme Court.

The author has attempted to summarize cases as concisely as possible. Technical legal language has been reduced to a minimum as far as practicable, without sacrifice of accuracy.

Legal aspects can hardly be investigated without portraying the social, economic and human elements as spelled out in the various litigated cases. As M. M. Chambers wrote, "A fascinating panorama comes into view when one observes the slowly changing concepts of rights, privileges, obligations and responsibilities of students, teachers, trustees, alumni, parents and the general public in this increasingly important area of social concern." [1]

In this context, the author has chosen to develop two additional volumes concerned with finance and taxation, and faculty and students, respectively. When all three in this series have been completed, summaries of more than fifty cases in the field of community-junior college education will be available.

In no sense are any of these volumes intended to be substituted for the professional services of attorneys at law. Any semblance of either a law manual or a comprehensive technical treatise is hereby expressly disclaimed. Instead, the aim is to serve as a handy reference to what has happened in the past and to stimulate thinking about the complex legal questions facing community-junior colleges in today's era of rapid change.

The major aim in collecting the essential material has been to summarize the facts and relate courts' decisions, briefly stating the reasoning of the court in each case. This basic case method has been used with the intention of aiding the student of junior college education, and to provide two-year college administrators, trustees, legislators and other interested persons with legal decisions affecting the institutions of their concern.

Each case is headed by a brief quote which focuses on the substantive legal principle or concern involved. The introductory chapter offers an overview and synthesis tracing the general development of the authorization and control of junior colleges throughout the country.

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[1] M. M. Chambers, The Colleges and The Courts, 1962-1966 (Danville, Illinois: Interstate Printers and Publishers, Inc., 1967), p. v.

As has been stated, the book does not include all cases in every state in the country. Rather, the aim has been to summarize selected cases that represent the pivotal issues.

An annotated table of contents of the forthcoming works related to finance and faculty and students is included in this volume.

For any and all errors of fact in this volume, I am solely responsible. In preparing this work, I have drawn heavily on experiences and conversations with many people in numerous colleges. Special thanks go to M. M. Chambers for counsel and permission to draw freely from his major works related to the colleges and the courts. Special thanks go to the students at the doctoral level who filled my classes and seminars at The Ohio State University and The George Washington University. Major help in research was performed by Harold Carr, James Wasserman and James Hoerner. Finally, gratitude is extended to faculty members and administrative officers who have offered ideas and stimulation throughout the preparation of the work.

# INTRODUCTION

Although the establishment of private junior colleges antedates the twentieth century, and some public two-year institutions also claim establishment during this early period, the first court interpretation relating to the community-junior college was not rendered until the late 1920's.

It is well known that two-year colleges are being started at the rate of one per week throughout the country. Litigation concerned with the authorization, control and legal status has been limited. The legal transition has been gradual and has promoted the stability that marks the constitutional and legal status of community-junior colleges today.

In the early 1920's, various problems of authorization and control arose from the indefiniteness and ambiguity of constitutional and legislative provisions throughout the nation. It is clear that the courts in all jurisdictions do not necessarily agree in all their holdings. Clear-cut legal principles, therefore, are hard to discern. To mention all the deviations from principles is impossible, particularly, since both the private and public sectors are involved.

In the late 1920's, court interpretations placed the junior colleges in the same general legal position as the high school. The early status was that the junior college was a super high school, not an institution of higher learning. A court ruled that the junior college was created and established solely for local purposes and occupied the same legal status as a high school in matters such as taxation and control. It was generally thought that junior colleges were created by legislative charter within constitutional provisions requiring the state legislature to coordinate the elementary, secondary and higher education institutions to lead to a standard of higher education, but left the legislature free to determine the best methods of this coordination. While the junior colleges were thought to be purely local in nature, maintained by local taxation, and created to supplement the courses of study prescribed in the high schools, the public higher educational institutions were thought to be state institutions having statewide operations and maintained by general taxation.

The concept of the junior college as a part of the public school system was further strengthened in the early 1930's when the courts held that the exercise of the discretionary powers by a public school district to establish a junior college as a part of an adequate and sufficient public school system was not open to judicial review.

Although it was not mandatory for a public school district to provide a junior college as part of the common school district, when charged by statutory provisions with the duty to maintain and operate an adequate and sufficient system of public schools, it was within its authority to establish, operate, and maintain a junior college as a part of the system of public schools (if in its best judgment it deemed that the junior college was necessary to maintain a standard of education). It was also within the authority of the public school district to operate and maintain the junior college through available public school funds.

The continued expansion of the junior college movement in the late 1930's influenced several state legislatures to enact special statutory legislation for the establishment and control of the junior college. In some states this legislation was sufficiently definitive to set the junior college apart from the public school system.

In reviewing junior college legislation, the courts concluded that the legislature had the power to establish junior colleges outside the common school system. The power to create junior colleges separate from the common school system through special legislation also included the authority to enact legislation authorizing separate tax levies for support of such institutions.

In states with constitutional limitations upon the legislative power to expend money for education for other than the common schools, the transition of the junior college from the common school system to separate school districts required that the boards of education obtain authorization for levying taxes for the support of junior colleges by vote of the electorate. In these states no sum could be raised or collected for education, other than for the common school system, until the question of taxation had been submitted to the voters.

Legislatures in many states had enacted statutory laws by the late 1950's which established the junior college as a separate and distinct institution between the common schools and four-year colleges and universities. Some legislation placed the control of the junior college in county units. Legal action challenging the constitutionality of statutes permitting counties to establish junior colleges and to pay one-half of the capital cost was answered by the court's ruling that such statutes did not violate constitutional prohibition against counties contracting indebtedness except for county purposes (even though less than fifty percent of the student body might come from the county). In junior colleges under county control, the county residents were eligible for entrance and the constitutionality of a junior college law was ruled not to rest on the possibility of what percentage of the total student body were resident students.

In the 1960's, the courts were called upon, further, to clarify the place of the junior college in the American educational system. The question of whether the junior college must be a part of another school district or whether it could be a separate district, and the constitutionality of legislative power to create junior college districts as local school districts continued to be challenged. In 1962 the Texas Supreme Court held, though with a division of opinion, that constitutional provisions for the legislature to provide and maintain "school districts heretofore and hereinafter formed" were broad enough to include junior college districts. There was lengthy dissent arguing that junior college districts are not school districts, but instead, college districts, and that junior colleges in Texas are not tuition-free, as are public schools. Consequently, legislatures had the legal power to create junior college districts if there was no specific prohibition in the constitution preventing the creation of such districts. These junior college districts were considered as local districts for control and taxation purposes, even though the state legislature provided additional financial support.

However, authorization to high school districts to establish and maintain comprehensive programs of vocational, terminal, continuation, and adult education in connection with the public schools of the district did not mean that they were authorized to engage in junior college instruction. To establish junior college instruction, the school board had to interpret and follow all statutory provisions. The statutes permitting the establishment of two-year programs beyond the high school level authorized establishment of junior colleges only when there had been a special levy approved by the electorate of the district. A legal junior college does not result unless all provisions of the statutes are effected.

In some states the county local legislative body or other appropriate governing agency had the power to appoint the trustees of the local junior college. It has been found by the courts in some states that the local governing agency has the authority to transfer power, to appoint junior college board of trustees to other units of local government, agencies or officers, with the appointments of such trustees subject to their confirmation. These local governing agencies also have the authority to select the methods of disbursing their contributions of monies to the junior college, and can repeal such selected method only by proper legislative procedure.

M. M. Chambers wrote that in 1961, New York Education Law, Section 6305 (6), set forth three methods of disbursement of a county's contribution to the operating expenses of its county community college, and authorized the "local legislative board" to select any one of the three. The Oneida County Board of Supervisors selected "Plan C" and used it in disbursing funds to Mohawk Valley Community College. Thereafter the board adopted a new county charter subject to approval by voters, and included in the new charter an express repeal of the resolution selecting "Plan C." The charter was approved at the polls.

The same new charter transferred the power to appoint the members of the community college board of trustees (until then residing in the county board of supervisors) to the county executive, subject to confirmation by the board. Education Law, Section 6305 (1), gave this power to "the local legislative board, or other appropriate governing agency."

Both of the just-described provisions of the new charter were challenged, and a declaratory judgment regarding the status of both was sought. The court held that "Plan C" must continue in force, because the statute authorized the choice among the three plans to be made by the board, and did not authorize the question to be submitted to the voters; and the transfer of the appointing power from the board to the executive with confirmation by the board was valid and effective, because the statute gave it either to the board "or to some other appropriate governmental agency."(Daugherty v. Oneida County, 22 A.D. 2d 111, 254 N.Y.S. 2d 372, 1964.)

This shift of jurisdiction of junior colleges from one controlling body to another often brings about problems, including that of the status of non-academic personnel. In a selected situation where the control of the junior colleges was changed from state education law to the board of higher education, the courts found that the positions of typists, clerks, and stenographers within the junior college are not the same as positions of college office assistants and college secretarial assistants and cannot be so until the positions might be equated by legislative action.

Although many legal actions still question the indefiniteness and ambiguity of junior college legislation, it appears that the better reasoned decisions sustain the junior college legislation as being outside the constitutional provisions relating to schools and that the junior colleges are solely creations of the state legislatures. Legislation does not intend for college districts to come within the confines of the general school systems. The courts tended in the past to term them quasi-corporations.

Chambers wrote that under a junior college act of 1963, New Mexico duly created a "New Mexico Junior College" in Lea County, in 1964, with a five-member governing board. A $3 million bond issue was approved, and the board organized itself and appointed a president of the institution in anticipation of opening its doors in September 1966.

The statute provided that, initially, the board members should be appointed, and moreover, required that they reside and own real estate in the district. The constitutionality of the act was challenged because Article VII, Section 2 of the Constitution of New Mexico stipulates:

> Every citizen of the United States who is a local resident of the state and is a qualified voter therein, shall be qualified to hold any elective public office except as otherwise provided in this Constitution.

The state supreme court decided that a member of a junior college governing board is not such a public officer as is contemplated in the quoted section, and hence there is no conflict between the constitution and the junior college act. Furthermore, the court took occasion to make clear its view that junior college districts are not to be necessarily regarded as subject to all the constitutional provisions relating to schools and school districts.[1]

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[1] M. M. Chambers, The Colleges and The Courts, 1962-1966 (Danville, Illinois: Interstate Printers and Publishers, Inc., 1967), pp. 148-149.

Oregon statutes provide that at a specific stage in the process of bringing to life a new public junior college district, the state board of education must hold locally a public hearing on the matter of "fixing of boundaries of an area educational district for junior college purposes." At a later stage the action of the board is subject to approval in a popular election within the district.

In Mohr v. State Board of Education (Ore. 1964), the board's authorized representative held a duly published hearing pursuant to ORS. 341.730 and ORS. 341.740, in which those present were permitted to express their views as to the desirability of establishing the district and as to the fixing of its boundaries. The only record was the minutes recording the name of each person who spoke, summarizing the views of each. The board later issued an order fixing the boundaries of the district. When a taxpayer therein asked the circuit court of Douglas County to invalidate it, the court reviewed the whole proceeding and reversed and remanded the board's order, because there was "no evidence which the court could review, and no evidence upon which the Board could have made its finding."

The Supreme Court of Oregon reversed this decision with some asperity, saying that the whole matter was more appropriate for legislative than for judicial determination, and declaring that

> Residents and taxpayers do not have any personal or property rights in a particular school district boundary arrangement which are entitled to be asserted in an adversary proceeding in frustration of the board's (state board of education's) efforts to carry out its policy-making function.

Another Oregon case related to boundaries was litigated in 1966. For discussion of facts and decision, see Barclay et al. v. State of Oregon.

Admittedly, particular sections of junior college legislation are not so explicit as to eliminate possible misinterpretations. However, where there is doubt of interpretation, the courts uphold the constitutionality of legislation if it is possible to do so.

In a 1970 decision of the Supreme Court of the United States, the highest court in the land reversed a Missouri Supreme Court decision concerning junior college trustees who were elected. The court laid down a general rule that "whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election." From this it follows that when officials are chosen within separate districts, the apportionment of the districts must be such as to make one vote count for as much as any other, "as far as is practicable."

The most recent federal court decision related to legal status and control ruled that a regional college association did not have to act on the accreditation request of a private, profit-making junior college. In this case, the court ruled that competition from profit-making institutions was "wholesome for the nonprofit educational establishment." The court concluded that "desire for personal profit might influence educational goals in subtle ways" that could go undetected by an extra-legal accrediting association, which is experienced in rating nonprofit schools. This U. S. Court of Appeals decision reversed a U. S. District Court order that the regional accrediting association involved had to accredit the profit-making private junior college if it met the association's standards.

*"The junior college is a super-high school, not an institution of higher learning, created and established solely for local purposes and occupies the same legal status as a high school in matters such as taxation."*

## McHENRY et al. v. OUACHITA PARISH SCHOOL BOARD

169 La. 646, 125 So. 841 (1929)
Decided by The Supreme Court of Louisiana

In deciding this case, which was brought by the plaintiffs to have a legislative act declared unconstitutional, to have the ordinances and special election of the school board annulled, and to perpetually enjoin them from levying and assessing a special tax, the court found it necessary to look at the place of the junior college in the state educational system. The nature of the action and issues before the court are clearly stated in the quoted material which follows.

JUSTICE LAND delivered the opinion of the court.

On November 9, 1928, the Ouachita Parish School Board adopted an ordinance creating and establishing a junior college district of the Parish of Ouachita, comprising the entire parish, for the purpose of establishing a junior college, in accordance with the provisions of Act No. 173 of 1928.

On the same date, another ordinance was adopted by the school board ordering a special election to be held in Ouachita Parish junior college district, for the purpose of submitting to the qualified electors of that district the question of the levy of a special tax of one mill for ten years "for the purpose of acquiring, erecting, constructing, establishing, operating, and maintaining a Junior College District in the manner provided by law, with special reference to section 10, article 10 of the Constitution of 1921 and all other laws pertaining thereto."

On December 12, 1928, the special election was held, at which a majority vote was cast throughout the district and parish in favor of the proposition submitted.

In order to prevent the school board from proceeding to levy and assess the special tax voted, the plaintiffs, who are duly qualified electors and taxpayers residing in the City of Monroe, Parish of Ouachita, and who own property within and without the city, have filed the present suit. They seek to have Act No. 173 of 1928 declared unconstitutional, and to have the ordinances of November 9, 1928, and the special election of December 12, 1928, annulled, and to perpetually enjoin the school board of Ouachita Parish from levying and assessing the one mill special tax.

Judgment was rendered in the lower court in favor of the plaintiffs, decreeing Act No. 173 of 1928, the Ouachita Parish junior college district, and the special tax created and imposed pursuant to the provisions of the act to be unconstitutional, null, and void, and annulling the ordinances of the Ouachita Parish School Board of November 9, 1928, and the special election held under the ordinance of December 12, 1928, and perpetually enjoining the school board from levying and assessing the one mill special tax.

From this judgment, the Ouachita Parish School Board has appealed.

Section 1, Article 12, of the Constitution, provides that: "The educational system of the State shall consist of all free public schools, and all institutions of learning, supported in whole or in part by appropriation of public funds."

Section 2 of the same article declares in mandatory terms that: "The elementary and secondary schools and the higher educational institutions shall be so co-ordinated as to lead to the standard of higher education established by the Louisiana State University and Agricultural and Mechanical College."

Act No. 173 of 1928, entitled an act "to authorize Parish School Boards of the several parishes throughout the State, the Parish of New Orleans excepted, to create Junior College Districts, each district to comprise an entire parish, and to establish Junior Colleges within said districts," is an act of the Legislature clearly intended to carry out the provisions of Section 2 of Article 12, to co-ordinate the elementary and secondary schools and the higher educational institutions of the state, so "as to lead to the standard of higher education."

It is plainly provided in Section 2 of Act No. 173 of 1928: "That any Junior College so established must be operated in connection with some State High School, and offer two years of standard college work, in keeping with accredited colleges, in advance of the courses of study prescribed for state high schools."

Section 3 of the act also provides that "only one Junior College" can be created for any one parish or district, and that junior colleges shall be located "so that they may be satisfactorily carried on in connection with some State Approved High School," and "the places best suited and adopted for the students of the whole Parish to be served by said Junior College."

The Constitution has left the Legislature free to determine in its own way the best method of effecting this co-ordination, and the method adopted has been fully set forth in Act No. 173 of 1928.

We find nothing in the provisions of this act in contravention of the provisions of Section 9, Article 12 of the present Constitution.

"The higher institutions of learning" of the state are major institutions, are state-wide in their operations, are maintained by general taxation, and are absolutely independent of each other. They are of an entirely different category from the "Junior Colleges" that may be established under Act No. 173 of 1928, as these colleges, so called, can have no legal existence or status whatever, except in connection with a state high school, are purely local institutions, are maintained by local taxation, and are created for the sole purpose of supplementing the course of studies prescribed in the high schools of the state. A "Junior College" is permitted, under Act No. 173 of 1928, merely to supply the place of a super-high school, in the carrying out by the Legislature of the constitutional mandate of co-ordination of the elementary and secondary schools, and the higher educational institutions of the state, so as to lead to the standard of higher education. Necessarily, these "Junior Colleges" fall within the classification of secondary schools, and occupy the same legal status as a state high school in matters of special taxes to be voted at special elections for the housing and maintenance of these institutions.

School districts are local political subdivisions of the state; parish school boards, as the local governing authorities of school districts, are authorized by law as public boards to levy special taxes in these districts for the purpose of constructing and maintaining schoolhouses. The special taxes so levied are therefore for local purposes.

"Junior Colleges" are mere super-high schools, and not institutions of higher learning of the state. For these reasons, it is as valid to levy a special tax under Act No. 173 of 1928 for the construction and maintenance of a "Junior College" as for the construction and maintenance of a schoolhouse for any state public high school.

Our conclusion is that Act No. 173 of 1928 is constitutional and valid legislation, and that the levy and assessment herein of the special tax, by virtue of the provisions of said act, do not deny to the plaintiffs the equal protection of the law, nor deprive them of their property without due process of law.

It is therefore ordered that the judgment appealed from be annulled and reversed.

CHIEF JUSTICE O'NIELL delivered the dissenting opinion.

The argument made in the prevailing opinion in this case, that the provision in Section 2 of Article 12 of the Constitution that the elementary and secondary schools (meaning the grammar schools and high schools) and the higher education institutions (meaning the state institutions which are so defined in Section 9 of the same article) shall be co-ordinated as to lead to the standard of higher education established by the Louisiana State University, gives authority for the establishment of junior colleges, is far-fetched. What is meant by that provision in the Constitution is that courses of study in the elementary and secondary schools and so-called higher educational institutions shall be co-ordinated so as to fit the student for the standard of higher education furnished by the State University.

As a matter of public policy the idea of establishing junior colleges as a part of our system of free education impresses me most favorably; but it ought to be done--and can only be done--either in conformity with, or by amendment of, the system provided for in the Constitution. For these reasons I respectfully dissent from the prevailing opinion and the decree rendered in this case.

*"The exercise of the discretionary powers by a public school district to establish a junior college as a part of an adequate and sufficient public school system is not open to judicial review."*

## ZIMMERMAN v. BOARD OF EDUCATION OF BUNCOMBE COUNTY et al.

199 N.C. 259, 154 S.E. 397 (1930)
Decided by The Supreme Court of North Carolina

ZIMMERMAN

In this case, the plaintiff, a resident and taxpayer of the City of Asheville, contends that the defendants have no power to maintain or continue to operate the junior college heretofore established and operated as a part of the public school system of the City of Asheville and to pay the expense of such operation out of the public school fund of that city. The plaintiff prays judgment that the defendants be enjoined from continuing the operation of the junior college as a part of the public school system as the defendants have declared it is their purpose to do.

The defendants, the Board of Education of Buncombe County and the School Board of the City of Asheville, contend that they have the power, in the exercise of the discretion vested in them by statutes (Private Laws 1923, C. 16, Private Laws 1929, C. 205), to maintain and to continue to operate the junior college and to pay the expense of the operation out of the school fund available for the operation of the public school system of the City of Asheville. The defendants say that the plaintiff is not entitled to a judgment enjoining their continued operation and maintenance of said junior college.

The lower court rendered a judgment that in accordance to the general school law enacted by the General Assembly and within the meaning of the State Constitution of North Carolina, the defendants did not have the power to operate the junior college and to pay the expenses out of the available public school fund, and were enjoined perpetually from doing so.

The defendants then appealed, and the higher court reversed the decision in favor of the defendants.

JUSTICE CONNOR delivered the opinion of the court.

Prior to April 30, 1929, the territory embraced within the corporate limits of the City of Asheville was a special charter school district, by virtue of the provisions of Chapter 16, Private Laws of North Carolina, 1923, which is entitled, "An Act to amend, revise and consolidate the statutes that constitute the charter of the city of Asheville." The Board of Commissioners of the city was expressly charged by statutory provisions with the duty of maintaining in the City of Asheville an "adequate and sufficient system of public schools," and for that purpose was authorized and empowered to construct and maintain in the city proper school buildings, which would be under its control and subject to its disposition. The Board of Commissioners was also authorized and directed to apply the public school fund of the city exclusively to the support of the public schools there.

The Board of Commissioners, in the exercise of the power conferred by statute upon them with respect to the public schools, established and maintained as a part of the public school fund of Asheville.

On and prior to April 30, 1929, the Board of Commissioners of the City of Asheville, which was then a special charter school district, maintained and operated in the school district a public school system consisting of kindergarten schools; elementary schools, composed of seven grades; high schools, composed of four grades; and the junior college. The school fund of the special charter district was sufficient to pay the expense of maintaining the public school system which the Board of Commissioners of the City of Asheville, in the exercise of power conferred upon them, considered adequate and sufficient for their city.

As the result of an election held pursuant to the provisions of Chapter 205, Private Laws of North Carolina, 1929, the Asheville special charter school district, became, for certain purposes, the Asheville local tax school district. It was expressly provided by the statute authorizing the change that, after such change was made, "the public school system of the Asheville local tax district shall be under the supervision and control of the superintendent and the board of school committeemen herein appointed, it being intended by this section to direct that the present standard of education in the public schools of the City of Asheville shall be maintained." (Section 10) It was also provided in this statute that the special taxes "heretofore voted in the City of Asheville for the maintenance and operation of the public schools of the city,...shall remain in full force and effect." (Section 14)

It appears from the statement of facts agreed upon, from which the question involved in this controversy without action was submitted to the court, that the predecessors of the defendants, in the exercise of their best judgment, established, as a part of an adequate and sufficient system of public schools for the City of Asheville, the junior college. That they had the power to establish and maintain the college, in the exercise of their discretion, it seems to us cannot be questioned. The public school fund available for the support of the public school system of Asheville was sufficient not only to support the elementary and high schools, which composed a part of the system, but was sufficient also to support the junior college. No additional tax was required to provide funds for the support of the public school system, or any part of it. It is true that the establishment and maintenance of the junior college was not mandatory as was the case with the elementary and high schools, under the general school law of the state. (C.S. Supp. 1924, No. 5386) The Board of Commissioners of Asheville had the power, however, in the exercise of their discretion, to establish, maintain, and operate the junior college as a part of an adequate and sufficient system of public schools for the City of Asheville, which was at that time a special charter school district, and not subject to the limitations in the general school law of the state, with respect to schools maintained and operated in accordance with its provisions.

By virtue of the provision of Chapter 205, Private Laws of North Carolina, 1929, the election provided for therein, the defendants as the successors of the Board of Commissioners of Asheville, have the same powers and are under the same legal duties as said board with respect to the public schools of Asheville. We are of the opinion that the defendants have the power in the exercise of their discretion to continue to operate the junior college heretofore established and maintained by their predecessor, certainly so long as they can do so without the levy of an additional tax for that specific purpose. Its continued maintenance and operation is within the discretion of the defendants. The exercise of such discretion by the defendants is not subject to judicial review. (School Committee v. Board of Education, 186 N.C. 643, 120 S.E. 202)

In accordance with this opinion, the judgment, enjoining the defendants from continuing the operation of the junior college is reversed.

Related cases:
Otken v. Lamkin, 56 Miss. 758
Christman v. Brookhaven, 70 Miss. 477, 12 So. 458
Scarbrough v. McAdams Consol. School District, 124 Miss. 844, 87 So. 140
Turner v. Hattiesburg, 98 Miss. 337, 53 So. 681

*"The legislature has the power to establish junior colleges outside the common school system."*

## WYATT v. HARRISON-STONE-JACKSON AGRICULTURAL HIGH SCHOOL- JUNIOR COLLEGE

170 So. 526 (1936)

Decided by The Supreme Court of Mississippi

JUSTICE ETHRIDGE delivered the opinion of the court.

This is an appeal by an objecting taxpayer from a final decree of the chancery court of Stone County validating $64,000 of notes of the Harrison-Stone-Jackson Agricultural High School-Junior College, located at Perkinston, in Stone County, proposed to be issued under the authority of Chapter 48, Laws of Mississippi, 1935, Extraordinary Session.

It was shown that the Junior College Commission had located said college, and in the agreed statement of facts, it was recited that all the proceedings were true and correct, and were in compliance with Chapter 48, Laws of Mississippi, 1935, Extraordinary Session.

The transcript of the proceedings, after submission to the state bond attorney and his approval secured thereon, was filed in the chancery court for validation. Due notice was made by the clerk to the interested parties, as provided by law, and T. P. Wyatt, a taxpayer of Stone County, filed his protest challenging the legality of the proceedings upon two grounds: First, that the chancery court did not have jurisdiction to validate the notes and proceedings; and, second, that Chapter 48, Laws of Mississippi, 1935, Extraordinary Session, under which the notes were issued, is unconstitutional inasmuch as it violates clause (p), Section 90, of the Constitution of 1890.

The chancery court overruled the objection to this loan, and validated the notes issued, and from this decree this appeal is prosecuted.

As to the jurisdiction of the chancery court to validate the notes, appellant contends that said notes did not come within the terms of Chapter 10, Code 1930, providing for the validation of bonds, the pertinent part of which reads as follows:

> When any county, municipality, school district, or any other district authorized to issue bonds shall take steps to issue bonds for any purpose whatever, the officer or officers of such district, shall transmit to the bond attorney a certified copy of all legal papers pertaining to the issuance of said bonds, and the bond attorney shall transmit all papers, with his opinion, to the clerk of the chancery court of the county in which the district proposing to issue the bonds is situated. At the hearing, if no written objection is filed by any taxpayer, the chancellor shall sign the decree, and when that is done, the clerk then enters the decree upon the minutes of the court in vacation.

The contention is here made that the Harrison-Stone-Jackson Agricultural High School-Junior College is not a district, or a municipality, as provided in the statute, and that this school and others of like kind do not constitute any district provided for in the statute.

This calls for an examination of the acts creating such schools. Sections 6674 to 6700, Code 1930, deal with this subject, and Section 6674 provides that the county school board in each county is authorized to establish not over two agricultural high schools in the county. Section 6675 provides for the support of such schools by a levy on the taxable property of the county or counties. Section 6677 provides for joint schools by two or more counties. Section 6679 provides for the ownership of joint schools. Section 6680 provides for the inspection of such schools, and for their support, in part, by the state; and that all expenses thereof are to be paid out of the agricultural high school appropriations. Section 6681 authorizes boards of supervisors to levy on the taxable property of the county or counties a tax for the building, repair, and equipment of such schools.

From these sections, it will be seen that agricultural high schools are not supported out of the common school fund, but are supported, in part, by taxes levied throughout the counties, and in part, by specific legislative appropriations. They are, therefore, school districts authorized to issue bonds under the purview of Chapter 10, Code 1930, and the chancery court had jurisdiction to validate its bonds.

It is next contended that Chapter 48, Laws of Mississippi, 1935, Extraordinary Session, is a local law by reason of the concluding paragraph of Section 7 thereof, and that it violates Section 90, clause (p), of the State Constitution. If an agricultural high school is not a part of the common school system of the state, then this clause has no application.

In the agreed statement of facts, it is recited that the entire territory of the state is divided into common school districts. The management of the common schools is provided for under different laws from agricultural high schools. They are separate institutions and have, in many respects, different purposes. If agricultural high schools were a part of the common school system, their support would be provided for in Sections 201 and 206 of the Constitution.

In Otken v. Lamkin, 56 Miss. 758, it was held that the common school fund can only be applied to such schools as are within the uniform system. In Chrisman v. Brookhaven, 70 Miss. 477, 12 So. 458, it was held that Section 201 of the Constitution did not prevent the Legislature from establishing special schools supported by public taxation, and in Turner v. Hattiesburg, 98 Miss. 337, 53 So. 681, it was held that the act creating the State Teachers' College did not create a school within the purview of Section 201; that the school so created was not a part of the common school system; and that, consequently, allowing the City of Hattiesburg to levy taxes and donate ground in order to secure its location did not violate the Constitution. In Scarbrough v. McAdams Consolidated School District, 124 Miss. 844, 87 So. 140, it was held that a special act authorizing the issuance of bonds of a consolidated school district for building an agricultural high school violates Section 90 (p) of the Constitution of 1890.

After a full and mature consideration of the power of the Legislature to create schools separate from the common schools provided for in Sections 201, 205, and 206 of the Constitution, we have reached the conclusion that the Legislature has such power, and that agricultural high schools and junior colleges now provided for constitute schools different from, and not a part of, the common school system, and that, consequently, Chapter 48, Laws of Mississippi, 1935, Extraordinary Session, does not conflict with Section 90 (p) of the State Constitution, and the exception, in the concluding paragraph of Section 7 of the chapter on agricultural high schools and junior colleges, or counties bordering on the Gulf of Mexico, does not render the act void, nor does it invalidate the proceedings here involved.

It follows from what has been said that the decree of the court, validating the proceedings, should be affirmed.

*"The boards of education must obtain authorization for levying taxes for the support of junior colleges by vote of the electorate."*

## POLLITT v. LEWIS et al.

269 Ky. 680, 108 S.W. 2d 675 (1937)
Decided by The Court of Appeals of Kentucky

JUSTICE STITES delivered the opinion of the court.

This case is an appeal from a judgment of the Boyd circuit court by which it sustained a demurrer to and dismissed the plaintiff's petition and likewise made a declaration of rights of the parties. Pursuant to Chapter 23 of the Acts of the Fourth Special Session of the General Assembly of Kentucky for 1936-37, the Board of Education of the City of Ashland has determined to organize and maintain a junior college in that city. In furtherance of this project, it was determined to acquire a site and construct a building for the use of the junior college, through the organization of a private corporation known as the Ashland Junior College Corporation. It is proposed that this corporation will acquire the site and construct the building from the proceeds of an issue of $40,000 in bonds and shall lease the property to the board of education for one year at a stipulated rental sufficient to amortize the bonds, and, in addition, the board is to pay the costs of insurance, maintenance, and taxes. The board is likewise given an option to renew the lease from year to year, in accordance with a stipulated schedule of annual rentals. It is likewise agreed that, upon the payment of the bonds and accrued interest thereon, the property will be conveyed to the board.

This suit was filed by a taxpayer to enjoin the Board of Education and others involved in the project from carrying out the proposed plan. The only questions here argued relate to the constitutionality of Chapter 23 of the Acts of Fourth Special Session of the General Assembly for 1936-37. It is insisted (1) that the tax authorized by Chapter 23 is a tax imposed for municipal purposes, in violation of Sections 181 and 181a of the Constitution: and (2) that a junior college is not a common school within the meaning of Section 184 of the Constitution, and no provision is made in the act for the submission to the voters of the question of taxation for the support of the college.

The short answer to appellant's first contention is that the act does not attempt to impose a tax for a municipal purpose, or, indeed, to impose a tax at all. It leaves open to the local school board the option to establish or not to establish a junior college. If they determine to establish such an institution, then they may require the council to impose a tax within maximum and minimum limits for this purpose.

A more serious question is presented by the second contention made by appellant. Section 184 of the Constitution, so far as it is pertinent here, provides:

> No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of votes cast at said election shall be in favor of such taxation: Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical college, shall remain until changed by law.

It is manifest that the very wording of the provision of Section 184 quoted imports that there are schools of a character different from common schools as mentioned therein. It is equally clear that the framers of the Constitution must have had in mind that they were placing a limitation upon legislative power to expend money for education other than in common schools.

No provisions of the Constitution can well be said to have provoked more discussion and feeling than those relating to the subject of education and particularly to Section 184.

Without a further extension of this opinion with quotations from the numerous arguments of the members of the Constitutional Convention relating directly to this subject, it will suffice to say that they demonstrate beyond all shadow of a doubt that the members of the convention did not conceive a college to be embraced in the ambit of the term "common school."

Similarly, the Legislature, itself, has recognized the settled construction placed on these words in Section 4363-2 of the Statutes (Acts 1934, c. 65) where it stated:

> A "common school" shall be interpreted as meaning an elementary and/or secondary school of the Commonwealth supported in whole or in part by public taxation.

In the face of the foregoing authorities, to say nothing of others too numerous to be incorporated here, it can scarcely be disputed that the term "common schools" had and has a fairly definite signification and, whatever else it may include, it does not include a college. Neither the statements of this court nor the pronouncements of the Legislature can make an institution a part of the common school system contrary to the mandate of the Constitution. As if to remove all doubt of the nature of the institution before us, the act itself provides in Section 5:

> A municipal junior college shall be entitled to support under this act only when its principal work is the maintenance of courses of instruction in advance of the instruction maintained in high schools under the control of the Board of Education.

Plainly, a junior college such as here proposed is, and can be, no part of the common school system and we are brought face to face with the proposition that "no sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters."

The Legislature may authorize the levying of all the taxes it wants to for common schools, but it cannot authorize the levy of a tax for education other than in common schools without a vote of the electorate. Howsoever much we as individuals may approve the measure here proposed, the choice is not ours, but must rest with the majority of those persons who will be taxed to support it.

The only points argued in the case at bar relate to the validity of so much of the act as undertakes to authorize the imposition of a tax without the consent of the voters. We see no reason why the remainder of the act may not be valid and the provision for the levy of a tax be separable therefrom. It follows from what we have said, however, that the trial court erred in sustaining a demurrer to the petition.

No reason presents itself which would lead us to conclude that the general council of the city may not call an election to determine whether or not the tax proposed shall be levied. Whether Section 184 of the Constitution is self-executing or not, it would appear that the general grant of powers to cities of the second class would include the right to call an election for this purpose.

Related cases:
City of Henderson v. Lambert, 8 Bush, (607) 610
Combs v. Bonnell, 109 S.W. (898) 899
Agricultural and Mechanical College v. Hager, 121 missing information

*"Statutes permitting counties to establish junior colleges and to pay one-half of the capital cost...do not violate constitutional prohibition against counties contraction indebtedness except for county purpoese even though less than fifty percent of the student body might be from the county "*

## GRIMM v. COUNTY OF RENSSELAER

171 N.Y.S. 2d 491 (1958)
Decided by The Supreme Court, Special Term, Rensselaer County

**The plaintiffs, taxpayers of the County of Rensselaer, brought proceedings challenging the constitutionality of a statute permitting a county to establish a community college, providing that the county pay one-half of the capital cost, and making such expenditure a responsibility of the county.**

**JUSTICE BOOKSTEIN delivered the opinion of the court.**

**Article 126 of the Education Law was enacted by Chapter 696 of the Laws of 1948. The article permits a county, as a sponsor, to establish a community college. Pursuant thereto, the County of Rensselaer, in October 1953, established such a college, known as Hudson Valley Technical Institute.**

**Article 126 provides state aid for community colleges to the extent of one-half of capital cost and one-third of operating costs, subject to certain maximum limitations and regulations.**

**As to operating costs, the state bears one-third, the sponsoring county one-third, and the students one-third, in tuition fees.**

**On or about July 9, 1957, the Board of Supervisors passed a resolution for the acquisition of certain real property and the construction and equipment of buildings thereon as a campus for the Hudson Valley Technical Institute at a total estimated cost of not exceeding $3,260,250 and providing for the financing of the county's share thereof, estimated to be $1,630,125, by the issuance of $1,548,000 serial bonds and $82,125 capital notes of the County of Rensselaer.**

**The plaintiffs, taxpayers of the County of Rensselaer, challenged the constitutionality of the Community College Law and the validity of the resolution.**

It is the contention of the plaintiffs that both the Community College Law (Article 126 of the Education Law) and the foregoing resolution are in violation of the constitutional provisions.

The quarrel of the plaintiffs appears not to be with the division of operating costs, but with the division of capital costs. They contend that if Rensselaer County students comprise less than one-half of the enrollment, a situation will exist whereby Rensselaer County is paying a higher percentage of capital cost than the percentage of Rensselaer County students in attendance.

It must be borne in mind that since Rensselaer County residents are eligible to enroll in community colleges in other counties which are paying for their institutions with similar financial arrangements, ultimately there may be no disparity at all, when the reciprocal situations are measured and balanced. It does not seem that the constitutionality of the Community College Law can hang on so slender a thread as is envisioned by the possibilities of what percentage out of the total student body are resident students.

Moreover, the Legislature has decreed that when a county sponsors a community college, the expenditures of the county for the college shall be a purpose of the county.

In the light of that enactment and of the decisional law in this state, this Court is of the opinion that Article 126 of the Education Law is constitutional and that the resolution of the Rensselaer County Board of Supervisors is valid.

Related Cases:
Gordon v. Cornes, 47 N.Y. 608
Tobin v. LaGuardia, 290 N.Y. 119, 40 N.E. 2d 287
College of City of New York v. Hylan, 205 App. Div. 372, 199 N.Y.S
Affirmed, 236 N.Y. 594, 142 N.E. 297

*"Constitutional provisions for the legislature to provide and maintain school districts 'heretofore and hereafter formed' is broad enough to include junior college districts."*

## SHEPHERD et al. v. SAN JACINTO JUNIOR COLLEGE DISTRICT et al.

363 S.W. 2d 742 (1962)

Decided by The Supreme Court of Texas

**Property owners in the San Jacinto Junior College District sought to enjoin the collection of a local ad valorem tax levied by the District for maintenance purposes. They recognized the legal existence of the District and conceded that the tax was authorized by statute, but asserted that the statute was unconstitutional in its undertaking to authorize the levy of ad valorem taxes for support and maintenance of a junior college.**

**The trial court hearing the action presenting the constitutional challenge to the tax levy upheld the validity of the statute. The plaintiffs appealed. The Supreme Court held that constitutional authorization of ad valorem taxation for school districts "heretofore or hereafter formed" was broad enough to include junior college districts.**

**JUSTICE NORVELL delivered the opinion of the court.**

**Preliminary to setting forth the contentions of the parties, we may properly allude to some well-recognized principles of constitutional law which are applicable here. A state constitution, unlike the federal constitution, is in no sense a grant of power, but operates solely as a limitation of power. "All power which is not limited by the Constitution inheres in the people, and an act of a state legislature is legal when the Constitution contains no prohibition against it."**

**It follows that if there be no limitation found in the Constitution, the legislature would be fully empowered to create or authorize the creation of junior college districts and authorize them to levy an ad valorem tax.**

**The appellants do not dispute the rules above stated nor do they contend that the Constitution, in so many words, provides that the legislature shall not authorize a junior**

college district to levy an ad valorem tax. They do, however, say that the legislative power to authorize a local ad valorem tax for junior colleges is denied by clear implication.

There have been a number of briefs filed in this case. The briefs submit two theories: (1) that there is no provision of the Constitution, expressed or implied, which prohibits the legislature from establishing a junior college district and authorizing it to levy an ad valorem tax, and (2) that the legislative power to authorize a junior college district to levy an ad valorem tax is supported by the provisions of Article 7, No. 3 of the Constitution.

The majority of this Court is of the opinion that Article 2815 h, No. 7 should be held valid and enforceable under the second theory above mentioned.

The solution of the problem is not free of difficulty. Our school laws have been characterized as confused, vague and conflicting. Article 7, No. 3 of the Constitution which is of importance here has been amended some six times since its adoption as a part of the Constitution of 1876. A junior college district is here involved and while some state schools bearing a resemblance to the present day junior college were in existence prior to 1929, the regional junior colleges for the most part came into existence as a result of the passage of the Junior College Act (Acts 1929).

Some difficulty of classification has arisen with reference to junior colleges and the regional districts supporting them. The junior colleges, developed for the most part since 1929, are sandwiched in, so to speak, between the high schools on the one hand and the colleges or universities on the other. In certain respects, the junior college is what its name implies, that is, a school which is above the high school level, yet one whose highest grade is below the educational level required for a degree from a university. Yet, as pointed out by one of the briefs on file here, it would not be inappropriate to refer to the districts which support such schools as "junior college districts," "advanced independent school districts," or "graduate high school districts." The point of this is that junior colleges and their districts may in some instances be regarded as colleges and in other instances as schools in the nature of advanced high schools.

It is argued by the Attorney General that the phrase "school districts heretofore formed or hereafter formed."

used in connection with the tax authorization power, is broad enough to include junior college districts created under and by virtue of the Junior College Act of 1929, Article 2815 h, Vernon's Ann. Tex. Stats., and that it would be wholly untenable to say that the phrase which defines one of the two purposes for which taxes may be levied as being for "the further maintenance of public free schools" operated to exclude junior college districts and restrict the meaning of the clause to elementary and high school districts. It is further suggested that Article 7, No. 3 does not define what is meant by the term "school district" or that of "public free school district," hence, this matter is left to the determination of the legislature. From these considerations and circumstances it is concluded that a district created under the Junior College Act falls within the definition, "school districts heretofore formed or hereafter formed" in the constitutional meaning of that term as used in the tax authorization clause.

In summary, it is the appellants' position that the constitutional phrase "all school districts heretofore formed or hereafter formed" does not embrace junior college districts.

As pointed out, it is the position of the Attorney General that junior college districts are embraced within this phrase and hence, the districts' taxing power for maintenance purposes rests upon a sound constitutional basis. We, therefore, have a squarely drawn issue presented for our decision.

It may be conceded that the appellants' position is buttressed by plausible arguments, but we cannot say that the theory urged by the Attorney General in support of the constitutionality of the taxing section of the Junior College Act is clearly wrong. In this situation, we must clearly examine another well-recognized principle of constitutional law.

In 1927, prior to the passage of the Junior College Act, the legislative branch of government propounded the following inquiry to the Attorney General:

> Has the Legislature the constitutional authority to enact a law providing for one or more school districts or counties to organize a junior college district and vote a tax for the support of such junior college?

The Attorney General, relying upon the Constitution, answered the question in the affirmative, and held that it was the "right and duty of the Legislature to make such provision for such schools and junior colleges as the Legislature in its wisdom deems best."

From 1927 until the present time, this holding of the Attorney General has never been directly questioned in the appellate courts of this State. As a consequence, the junior college has become an integral part of the Texas educational system. The number of junior colleges has multiplied, and most of them depend upon the taxes authorized by Article 2815 h, No. 7.

Numerous bond issues have been authorized by the qualified voters of the various junior college districts of this state and approved as to legality by the Attorneys General who have served the State since 1929.

Under these circumstances, we are confronted with a stronger doctrine than that arising from the decent respect which one branch of government should have for another. General public acceptance of and acquiescence in a certain construction of a constitution extending over a long period of time, particularly when occasions for the questioning of such construction have arisen repeatedly, gives rise to a doctrine that affords to such acceptance a persuasiveness akin to precedent. With the sale of every bond issue and the collection of each tax levied, an opportunity was presented to challenge the constitutional tax basis of the junior college districts. For years no such attack was made, with the result that the junior colleges became an essential and desirable element in the Texas system of public education. Any impairment in the efficiency of their functions and service capacities at the present time could lead only to undesirable results from the standpoint of the citizenry as a whole. While this public acquiescence could not result in a precedent in the judicial sense, yet this general acceptance does carry with it a persuasiveness of compelling force. Where, as hereinabove pointed out, there is a tenable theory supporting the questioned legislative power, the taxing provisions of the Junior College Act should be upheld.

Related cases:
Barber v. County Board of Trustees, 43 S.W. 2d 319
Mumme v. Marris, 40 S.W. 2d 31
San Antonio Union Junior College District v. Daniel, 206 S.W. 995
Williams v. White, 223 S.W. 2d 278

*"A hearing required in regard to fixing the boundaries of an education district for community junior college purposes is not an adversary hearing."*

## MOHR v. STATE BOARD OF EDUCATION

388 P. 2d 463 (1964)
Decided by The Supreme Court of Oregon

A taxpayer acted to have an order of the State Board of Education fixing boundaries of an area education district for community college purposes declared void. The Circuit Court entered a decree adverse to the Board and the Board appealed.

JUSTICE O'CONNELL delivered the opinion of the court.

A petition requesting the formation of a community college district in Douglas County was presented to the board pursuant to ORS 341.710. After setting a time for hearing upon the petition, notice was given by publication and the hearing was held by an authorized representative of the Board on November 26, 1962. (ORS 341.730 and 341.740) Those present at the meeting were permitted to express their views as to the location of the boundaries of the proposed district and the desirability of establishing it. The hearing was not adversary in character. The only record of the hearing was that contained in the minutes which recorded the names of those who spoke for and against the petition and in a sentence or two indicated the view each expressed on the proposal made in the petition.

On December 11, 1962, the Board entered an order fixing the boundaries of the proposed area education district, these boundaries embracing all of the territory specified in the petition. Thereafter, Al Mohr, an inhabitant and taxpayer residing in one of the school districts included in the proposed area education district, filed a petition in the Circuit Court for Douglas County praying for an order reversing and vacating the Board's order.

The Circuit Court set aside the Board's order and remanded the case to the Board for further proceedings on the ground that the hearing held by the Board did not satisfy the requirements of ORS 341.730 and 341.740.

On appeal the Board contents (1) that plaintiff does not have standing to attack the Board's order, and (2) assuming that he has standing, that the hearing satisfied the requirements of ORS 341.730 and 341.740.

Assuming without deciding that plaintiff has standing, the decree of the lower court must be reversed. We are of the opinion that the legislature did not intend to provide for an adversary type hearing preliminary to the formation of an area education district. ORS 341.730 and 341.740 simply provide that there shall be a hearing on the petition without describing the form the hearing is to take. There is nothing in the wording of the statute which would indicate a legislative preference for an adversary type hearing.

The intention of the legislature to provide only for an "auditive" precedure (simply to permit the making of remonstrances) rather than an "adversary" procedure can also be derived from the manner in which reference was made in the area education district law to the Administrative Procedure Act. Generally speaking, the proceedings of the State Board of Education are governed by the Administrative Procedure Act. Provision is made in the act for an adversary type hearing, but such a hearing is required only in a contested case.

In the first place, the statute providing for the creation of area education districts does not require that specific parties be afforded an opportunity to appear and be heard. Rather, the statute contemplates a general notice by publication stating that all who are interested may appear and be heard, and makes no provision for notice to and appearance by specific individuals or interest groups.

Secondly, had the legislature desired the adversary type of hearing provided under ORS 183.420, it would have been a simple matter to have incorporated that section by reference, as it did in providing for appeal from the Board's orders.

Finally, it is to be noted that the order of the Board does not conclude the procedure by which the area education district is created. The statutes provide that after the entry of the Board's order, the decision as to whether an area education district will be created is submitted to the electors of the area. Through such "direct review" by the electors themselves, the Board's action is subject to further public scrutiny and control. With this additional safeguard against capricious or unpopular action by the Board, there would be less reason for the legislature to provide the safeguards provided by an adversary hearing. We are entitled to take this into account in construing the area education district statutes.

The decree of the lower court is reversed.

Related Case:
School District No. 7 of Walbowa County v. Weissenfluh, 337 P. 2d 567

*"Authorization to high school districts to establish and maintain comprehensive programs of vocational terminal, continuation, and adult education in connection with the public schools of the district does not mean that they are authorized to engage in junior college instruction."*

## STATE OF WYOMING ex. rel. FREMONT COUNTY VOCATIONAL HIGH SCHOOL DISTRICT v. COMMUNITY COLLEGE COMMISSION

393 P. 2d 803 (1964)
Decided by The Supreme Court of Wyoming

After an unsuccessful attempt had been made to establish a junior college in Fremont County, the trustees of the Fremont County Vocational High School adopted a resolution to establish a junior college. The trustees then sought a petition for a writ commanding the Community College Commission to declare individual relators as full members of the commission with all rights and privileges therein under provisions of state statute which provides that the commission shall consist of "The executive head of any junior college or university center and one member appointed by the board of trustees of any school district or high school district maintaining such institution."

CHIEF JUSTICE PARKER delivered the opinion of the court.

The relators argued three facets:

(1) That the Fremont County Vocational Junior College was duly organized on January 10, 1961, by the adoption of a resolution of the high school district;

(2) That an amendment by the 1961 legislature of No. 21-313 was inconsistent with and repugnant to an amendment to No. 21-446(h), W. S. 1957, by the same legislature and the latter amendment is controlling; and

(3) That the mentioned 1961 amendment of No. 21-313 was unconstitutional.

We consider the first facet of the argument. The January 10, 1961 resolution provided:

> We, the Board of Trustees of Fremont County Vocational High School, having had sufficient evidence presented to us in the form of a survey by representatives of the University of Wyoming and from numerous people in this community, have decided in compliance with No. 21-313, to establish and maintain a comprehensive program of vocational, terminal, continuation, and adult education in connection with and utilizing the facilities of the Fremont County Vocational High School. This comprehensive program will temporarily utilize the high school facilities at such times as not used by the high school students. Such a program will be under the direct control of the trustees as duly elected to the Fremont County Vocational High School Board. Be it further resolved that such a program will be separate from the high school program and will be hereafter referred to as a separate body known as the Fremont County Vocational Junior College.
>
> The Board of Trustees of the Fremont County Vocational Junior College further define their duties in compliance with No. 21-315 (W. S. 1957) as follows: (Thereafter followed an exact copy of the provisions of No. 21-315, except the introductory statement reading, "The board of trustees of any school or high school district voting a special levy for the purpose provided for by No. 21-314 (W. S. 1957) shall have the authority, in addition to their authority now provided by law.")
>
> Due to the above facts, we, the Board of Trustees of the Fremont County Vocational Junior College do hereby appoint Dr. John W. Reng as President and hereby direct him to secure such other personnel as may be necessary, and to do so at the earliest possible time.
>
> We, the Board of Trustees, do unanimously endorse and approve this resolution entered in the Minutes of the Board this Jan. 10, 1961.

No argument is presented by relators that a junior college could have been established by compliance with No. 21-313 alone. Instead, they tacitly admit that the provisions of

No. 21-315, with which they purported to comply by copying them in the resolution, were "in addition to their authority now provided by law," ignoring the provision that this was available only to "The board of trustees of any school or high school district voting a special levy for the purpose provided for by No. 21-314."

This is a serious and wholly unjustified omission. Not only must the three sections be read in pari materia in accordance with well established precedent relating to statutory interpretation, but No. 21-315 removes all doubt by providing that the activities recited therein are authorized only when there has been a voting of a special levy.

Section 21-313, before the 1961 amendment, authorized the district:

> ...to establish and maintain a comprehensive program of vocational, terminal, continuation, and adult education in connection with the public schools of the district. Such comprehensive program may include instruction in any occupation for which there is need in the community, together with such related instruction as the board of trustees may determine. The offerings shall be open to high school pupils, out-of-school youth or adults, and shall be given in the regular high school grades or as post-graduate work.

By no interpretation, however strained, would this authorize college or junior college instruction. Analysis of No. 21-313, 21-314, and 21-315 shows that only No. 21-315(d) permitted a high school district to engage in college or junior college instruction. That subsection read:

> (The board of trustees of any school or high school district voting a special levy for the purpose provided for by No. 21-314 shall have the authority, in addition to their authority now provided by law) To promote the general welfare of the schools of the district for the best interests of education and the district to the end that such district may be fully accredited for two years above high school level of such vocational, general education and academic courses as may be approved by the board of trustees of said district or the University of Wyoming.

It follows that the attempted establishment of a junior college by the resolution of January 10, 1961, was not in accordance with the provisions of the statutes and is of no force and effect.

In view of the holding that there was no initial establishment of the junior college issue, it is unnecessary to discuss the other points raised by the relators.

Mandamus will not issue unless the right therefor is clear. The petition for the writ is denied.

*"The county local legislative body or board or other appropriate governing agency has the power to appoint the trustees of the local junior colleges, to transfer this power to appoint the junior college board of trustees to other units of local government, agencies or officer, to select the methods of disbursing their contributions of monies to the junior college."*

## DAUGHERTY v. COUNTY OF ONEIDA

22 A.D. 2d 111, 254 N.Y.S. 2d 372 (1964)
Decided by The Supreme Court of New York,
Appellate Division, Fourth Department

**The County Board of Supervisors of Oneida County selected (with the power vested in them to do so) a method of disbursement to be used for disbursing the county's appropriation to Mohawk Valley Community College which was established under law by the county. Having made this selection, the Board decided to change it by incorporating an attempted repeal of the selected resolution in a general election to adopt a charter for the County of Oneida. The general election passed the Charter vote and subsequently ratified the original resolution concerning disbursements.**

**The Plaintiff, which included the trustees of Mohawk Valley Community College, contended that the purported revocation of the resolution was ineffective and that the original resolution remained in effect. They also took issue with a section of the Charter which provided for the power to appoint members of the college board of trustees to be transferred from the county board of supervisors to the county executive.**

**The court found the revocation of the resolution to be ineffective and the transfer of power to appoint trustees of the Mohawk Valley Community College to be valid and effective.**

**JUSTICE DEL VECCHIO delivered the opinion of the court.**

**Mohawk Valley Community College is a community college established under Education Law, Article 126 by its local**

sponsor, the County of Oneida. In 1961, Education Law No. 6305 (6) set forth three methods of disbursement of the sponsor's contribution to the college's operating expenses and vested in the "local legislative body or board, or other appropriate governing agency" of the sponsor the power to select which method would be used. On May 10, 1961, the Board of Supervisors of the County of Oneida adopted Resolution No. 108 by which the third alternative, known as "Plan C," was chosen as the method to be used in the case of Mohawk Valley. Under this plan, appropriations for maintenance of the college were to be paid to the college's board of trustees for expenditure by the trustees.

Thereafter, the Board of Supervisors adopted a charter for the County of Oneida, subject to approval by public referendum at the general election to be held November 7, 1961. Included in the charter (which was subsequently ratified by the voters) was a provision expressly repealing Resolution No. 108 of May 10, 1961.

Plaintiffs in this action include the trustees of Mohawk Valley Community College, the State University of New York and the Attorney General. It is their contention that the purported revocation of Resolution No. 108 was ineffective and that the selection made by the resolution, not otherwise revoked, remains in effect.

There is no dispute that, having selected a plan for payment of the County's contribution to the college's operating expenses, the Board of Supervisors could thereafter repeal that selection and make another choice as authorized by Education Law No. 6305(6). To bring about such a repeal, however, the Board was required to follow its usual legislative procedure and arrive at a considered judgment culminating in final, effective action. This it did not do. By incorporating an attempted rescission of Resolution No. 108 in the proposed county charter it conditioned the effectiveness of its action upon agreement and approval by the voters. But Education Law No. 6305(6) vested the power to select a payment program in the "local legislative body or board," not in the general public. The choice of plans should have been made in accordance with the Board's regular procedure, unfettered by additional requirements of public approval.

We therefore conclude that the attempted repeal of Resolution No. 108 was ineffective and void. The parties have stipulated that the resolution "has never been modified or repealed" except by the charter provision, so it is the judgment of this court that it is still in effect.

A second provision of the charter has also given rise to a dispute between the parties to the present litigation. Section 2004 provided in part that the power to appoint members of the college board of trustees, then residing in the Board of Supervisors, should be transferred to and exercised by the county executive, subject to confirmation by the Board of Supervisors. Further, the Plaintiffs contend that the appointive power could not be so transferred in view of Education Law No. 6306(1), which confers the power to designate five members of the college board upon "the local legislative body or board, or other appropriate governing agency" of the sponsor.

We think, however, that the transfer of such appointive power to the county executive was expressly authorized by Sections 323(4) par. a and 324(3) par. b of the County Law, as they existed at the time of the enactment of the Oneida County Charter.

County Law No. 323(4) par. a provided that a county charter enacted pursuant to the County Charter Law might "assign executive or administrative functions, powers and duties to elective or appointive officers." Section 324(3) par. b set forth limitations on county charters imposed by the legislature and included the following:

> Except in accordance with laws enacted by the legislature, a county charter or charter law shall not supersede any general or special provision of law enacted by the legislature.
>
> Insofar as it relates to the educational system in the county or to school districts therein, except that functions, powers or duties assigned to units of local government or to agencies or officers thereof outside the educational system may be transferred to other units of local government, agencies or officers as authorized by this article.

We think that the language of this section created a limited exception to the ban against county charter provisions which would supersede state legislation in the field of education, and that it was express authority for the transfer of the Board of Supervisors' power to appoint community college trustees to the Oneida County executive, subject to confirmation by the Board. The transfer of the appointive power, which in effect superseded the provision of Education Law No. 6306(1), falls precisely within the exception quoted above. Although the power of appointment related to education, it was a power "assigned to units of local government or to agencies or officers thereof outside the educational system," for there can be no question that the Board of Supervisors, as local legislative body of the community college sponsor, fits this description. It is also clear that the transfer to the county executive was a transfer "to other units of local government, agencies or officers" who was an "elective or appointive officer" within the meaning of No. 323(4) par. a, so that the transfer was unquestionable "as authorized by this article."

Judgment should be entered declaring that Resolution No. 108 adopted by the Oneida County Board of Supervisors on May 10, 1961, has not been repealed, and is still in effect; and that No. 2004 of the Oneida County Charter, which transfers to the county executive the power to appoint trustees of the Mohawk Valley Community College, subject to confirmation by the Board of Supervisors, which power formerly resided in the Board of Supervisors, is valid and effective.

Submitted controversy determined, in favor of plaintiffs without costs, in accordance with the Opinion. All concur.

*"The position of typists, clerks, and stenographers within the junior college secretarial assistants and college secretarial assistants and cannot be so untill the positions might be equated by legislative action."*

## ARNOW v. BOARD OF HIGHER EDUCATION OF CITY OF NEW YORK

267 N.Y.S. 2d 55, 25 A.D. 2d 511 (1966)
Decided by The Supreme Court of New York, Appellate Division, First Department

**The petitioners in this case, typists, clerks and stenographers of two-year community colleges administered by the Board of Higher Education of the City of New York, felt that they were entitled to receive compensation for past and future services as college assistants and college secretarial assistants, now that the two-year community colleges were under the same jurisdiction as the four-year colleges. They felt that their positions were the same as those of college assistants and secretarial assistants of the four-year colleges; therefore, they should receive equal status.**

**The supreme court concluded that the positions of the petitioners at the two-year community colleges were not the same as college office assistants and college secretarial assistants.**

**J. P. BREITEL headed the court delivering the opinion.**

**Per curiam (by the court) judgment was unanimously reversed, on the law, with $50 costs to respondent-appellant, and the petition dismissed. This is an Article 78 proceeding for judgment declaring that petitioners, who are typists, clerks and stenographers employed in the two-year community colleges administered by respondent-appellant, are entitled to receive compensation for past and future services as college office assistants and college secretarial assistants scheduled under Section 6214 of the Education Law. The positions were initially established and scheduled by Chapter 525 of the Laws of 1952. The senior (four-year) colleges were then under the jurisdiction of the respondent; the community (two-year) colleges were not then under its jurisdiction. The Staten Island Community College was founded in 1955 and was the**

first community college to come under the jurisdiction of the respondent. The career and salary plan of the City of New York was adopted July 9, 1954. The respondent duly elected to conform to the City plan on March 21, 1955, and the Board of Estimate, on April 21, 1955, approved election of the respondent. Thereafter, petitioners passed competitive examinations for the positions of either typist, stenographer or clerk. Each was appointed to one of the positions from a City list and either employed in or transferred to a community college. Section 6214 of the Education Law was amended in 1959 (L. 1959, Ch. 600) to "except community colleges sponsored or administered by the Board of Higher Education of the City of New York." In 1964, the section was again amended to include the community colleges. It was not until 1964 that the respondent adopted by-laws applicable to community colleges, the effect of which was to adopt the titles and salary schedules established under the career and salary plan of the City of New York. The educational and experiential qualifications for the positions of college office assistants and college secretarial assistants of the four-year colleges under the respondent's jurisdiction, set out in its by-laws pursuant to subdivision 3 of Section 62-2-a of the Education Law, differ from and are greater than those for the positions for which the petitioners qualified. In 1964, bills passed by the Legislature (Senate Intro. 649, Pr. 3750; Assembly Intro. 1483, Pr. 5370) designed to give the petitioners and others similarly situated the titles and compensation sought here to be established in their behalf were vetoed by the Governor. We conclude, in the light of the foregoing, that the positions of college office assistants and college secretarial assistants scheduled under Section 6214 of the Education Law are not the same as the positions to which the petitioners have been appointed and now hold.

*"Junior colleges are solely creations of the legislature...quasi-corporations are not public officers, and the legislature may fix qualifications for such board members as to residence and real estate ownership within the districts."*

## DANIELS et al. v. WATSON et al.,
## As Members of the New Mexico Junior College Board

75 N.M. 661, 410 P. 2d 193 (1966)
Decided by The Supreme Court of New Mexico

**In this case, the plaintiff claimed that the "Junior College Act" was unconstitutional in several respects, and brought contention on sixteen separate points. The contentions dealt with such items as the right of a junior college district to require its board members to reside and own real estate in the district, the debt limitations of the district, the legislative power of the act, the right of the attorney general to approve or disapprove bonds, and the junior college being separate from regular school districts.**

CHIEF JUSTICE CARMODY delivered the opinion of the court.

This is an appeal from the judgment of the district court, holding the Junior College Act to be unconstitutional, and dismissing the complaint filed by the plaintiffs.

The "Junior College Act" was enacted by Ch. 17 of the Session Laws of 1963, and was partially amended by Ch. 16 of the first special session of the legislature in 1964. The Act states its purpose as follows:

> The purpose of the Junior College Act is to provide for the creation of local junior colleges and to extend the privilege of a basic vocational, technological or higher education to all persons who are qualified to pursue the courses of study offered.

In general, it provides for the formation of the junior college districts and the selection of the members of the supervisory board, for the means for the operation of the junior colleges, and provides for the issuance of bonds. In other words, it seemingly contemplated an authorization and implementation of a post-high school educational system, separate from that which had heretofore existed in New Mexico, The plaintiffs claim that the Junior College Act is unconstitutional in several respects, and have briefed their contentions under sixteen separate points.

Initially, it is urged that the Act is in violation of Article VII, No. 2, because it is a superaddition of requirements to constitutional qualifications for holding office. The statute requires that board members of a junior college district must be owners of real estate within the district. Article VII, No. 2, insofar as is pertinent, is as follows:

> Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office except as otherwise provided in this Constitution.

As we understand the argument, the plaintiffs assert that junior college board members are public officers as contemplated by the Constitution. Actually, the answer to this claim may be found in Davy v. McNeill (1925, 31 N. M. 7, 240 P. 482), in which the court determined an irrigation district to be a "public corporation for a municipal purpose" as opposed to a "municipal corporation" or a municipality. We there construed the intent of the framers of the Constitution respecting the meaning of the term "public officers" and said that the officers of "a public corporation for a municipal purpose" are not "public officers" within the contemplation of Article VII, No. 2. As in Davy, we are here concerned with the definition of that term within the sense of the Constitution. In our judgment, a junior college district is a quasi-municipal corporation comparable to the irrigation district with which Davy v. McNeill was concerned. We think that the officers of junior college districts, like those of irrigation districts, are not those contemplated by the Constitution. Accordingly, Article VII, No. 2, does not restrict the legislature in fixing the qualifications of such board members.

It is next argued that the Act requires board members to reside in the junior college district, in violation of Article V, No. 13, on the theory that the board members are state officers, not district officers, and therefore their residence cannot be restricted. Since, as we have said, board members are not elective public officers in the sense as used in No. 2, Article VII, of the Constitution, the legislature may justifiably set their qualifications. We therefore hold that the residence requirement for board members does not violate either No. 1 or No. 2 of Article VII of the Constitution.

The plaintiffs next maintain that the statute providing that persons must be owners of real estate in the district in order to be eligible to sign a petition calling for the organization of the district, to vote on the establishment of the district, and to vote on the issuance of bonds, is contrary to the provisions of Article VII, No. 1. The constitutional provision, insofar as applicable, reads:

> Every male citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county, ninety days, and in the precinct in which he offers to vote, thirty days, next preceding the election, shall be qualified to vote at all elections for public officers.

It should be apparent that our determination that the members of the board of directors are not elective public officers would seemingly dispose of this argument, because the above-quoted constitutional section deals with elections for public officers and has no application to the signing of petitions or either of the elections in question.

It is urged that the general tenor of the entire Act is to require ownership of real estate in order to qualify as an elector, and that such a requirement is violative of Article VII, No. 1. This is an enlargement of the argument hereinabove disposed of, and still the answer is the same. In any event, doubt must be resolved in favor of the constitutionality of the statutes, and we do so here. (State ex rel. West v. Thomas, 1956, 62 N. M. 103, 305 P. 2d 376; State ex rel. Murphy v. Morley, 1957, 63 N. M. 267, 317 P. 2d 317; and El Paso Electric Co. v. Milkman, 1959, 66 N. M. 335, 347 P. 2d 1002.)

The next five points made by the plaintiffs are to the effect that a junior college district is a school district, and, as such, must be governed by the constitutional provisions relating to schools and school districts.

There is a split of authority on this question, but, in our opinion, the cases relied upon by the plaintiffs are distinguishable by reason of the constitutional provisions involved, and even if not, it appears to us that the better-reasoned decisions sustain junior college legislation as being outside the constitutional provisions relating to schools and being solely creations of the legislature. (Goshen County Community College Dist. v. School Dist. No. 2, Wyo. 1965, 399 P. 2d 64 and Pollitt v. Lewis, 1937, 269 Ky. 680, 108 S. W. 2d 671, 113 A. L. R. 691) In this same connection, we give great weight to the legislative declaration of the purpose of the junior college districts (Hutcheson v. Atherton, 1940, 44 N M. 144, 99 P. 2d 462), and it appears to be plainly manifest that the legislature did not intend junior college districts to come within the general school system.

It is next asserted that the combined school district and junior college district debts could exceed the constitutional limitation contrary to Article IX, No. 11. Without extending this opinion, it is only necessary to note Albuquerque Metropolitan Arroyo Flood Control v. Swinburne (1964, 74 N. M. 487, 394 P. 2d 998, which contains a complete answer to this proposition and also assembles the authorities on the subject. The following quotation from the Swinburne case is sufficient:

> It is clear that the indebtedness proposed by the Flood Control Authority is not one contracted by either a county, city, town or village or school district, but is one imposed by a special quasi-municipal corporation under legislative authority. The legislature has plenary legislative authority limited only by the state and federal constitutions. Legislation may be validly enacted if not inhibited by one or the other of these documents.

It is then argued that the Act violates Article III, No. 1 and Article IV, No. 1, as being an unlawful delegation of legislative power, and a violation of the separation of powers. The plaintiff's theory here is that the authorization to form a junior college district by petition method is unconstitutional. We need search no further than our own cases for an answer to this contention. This is not a delegation of power, but merely a statutory method for implementing the legislative determination of a purpose to be fulfilled. It should be apparent that no act of the legislature can be so detailed as to provide for every possible contingency--something must be left to those who desire to take advantage of the broad general statute, and this is exactly the type of legislation we have here. There is no violation of the constitutional prohibition concerning separation of powers.

It is also urged that the provision of the statute authorizing the attorney general to approve or disapprove the bonds is legislation by reference and in violation of Article IV, No. 18. Although such a practice is to be condemned when it is applied to matters of substantive rights, the rule is different where the reference is to a procedural matter; there is no constitutional prohibition to the power granted the attorney general in this case because it is procedural only.

It is argued that the provision of the Act which requires election of board members by "registered" voters is so indefinite as to be invalid because there is no specific provision in the Act for the registration of voters. Here, again, the argument is substantially answered in the point immediately preceding; but, in any event, we find the argument without merit, as the term "registered voter" must certainly refer to one duly registered under our general election laws.

Section 73-33-13, subd. B., provides as follows:

> The bonds shall be payable semi-annually and shall be due and payable serially, either annually or semi-annually, commencing not later than three years from their date. Such bonds shall be issued for a term of not less than five nor more than twenty years. The form and terms of the bonds, including provisions for their payment and redemption shall be as determined by the board. If the board so determines, the bonds may be redeemable prior to maturity upon payment of a premium not exceeding three percent of the principal thereof. The bonds shall be executed in the name of, and on behalf of, the district and signed by the chairman of the board. Such bonds may be executed and sealed in accordance with the provisions of the Uniform Facsimile Signature of Public Officials Act. Interest coupons shall bear the original or facsimile signature of the chairman of the board.

Plaintiffs contend that such a provision is void for indefiniteness.

Admittedly, the draftsmanship of this particular section leaves much to be desired. However, as we have stated, where there is doubt, the constitutionality of legislation should be upheld if it is possible to do so. With this view in mind, and in an effort to give the statute a sensible effect and make it binding, we find that the legislative intent was to provide that the bonds shall be payable semi-annually.

It is finally argued that the entire Act is void for indefiniteness, insofar as it authorized the retirement of bonds and the payment of interest, because No. 73-33-13, subd. C, specifies a maximum annual tax levy of not more than five mills, whereas the following section (No. 73-33-13.1, subd.A) provides that taxes may be levied "without limitation." The above-named sections are companion parts of Ch. 16 of the first special session in 1964, and, although certainly not as clear as might be preferred, when the two sections are considered together, the legislative intent is made clear and any seeming conflict vanishes. This is made plain when consideration is given to the fact that No. 73-33-13, subd. C contains language following the five-mill limitation, which specifies that the five-mill limitation may be exceeded in any year that the property valuation in the junior college district declines to a lower level than existed in the year the bonds were issued. Therefore, we do not perceive the indefiniteness or ambiguity as claimed by the plaintiffs and find this point without merit.

Our determination that the Junior College Act is constitutional, insofar as the grounds herein urged are concerned, makes it unnecessary for us to pass upon the last point argued by the plaintiffs.

The judgment is affirmed. It is so ordered.

*"The argument about boundaries is specious...the lawful exercise of express statutory powers is not arbitrary."*

## BARCLAY et al. v. STATE OF OREGON, Acting Through its State Board of Education

417 P. 2d 986 (1966)
Decided by The Supreme Court of Oregon

The State Board of Education issued an order establishing the exterior boundaries of a proposed area education district in Linn and Benton Counties on the basis of existing school districts. The order also fixed zone boundaries for the election of directors. The purpose of the proposed district was to establish a community college. The law authorizing establishment also permits an appeal (for judicial review) to the order which must precede the election in which the voters of the proposed district approve or reject it. The petitioners were residents of the proposed district who did not wish to be included. The Board's record was not filed with the court, but an adversary hearing was held at which the petitioners questioned the benefits to be derived and contended that the boundaries were uncertain and subject to change. Consequently, the proceedings were void. In addition, the hearing was void, because the Board was represented by only one of its members.

JUSTICE SLOAN delivered the opinion of the court.

In seeking this review of the order, it does not appear that either party attempted to conform to the review proceedings required by ORS. 183.480. The failure to follow that statute causes the review hearing before the circuit court to be a nullity.

If there had been anything alleged in the petition filed with the court which would have justified judicial review, we would be obliged to remand the case for proceedings according to the statute. The court was not authorized to receive evidence. The allegations about the boundaries relate to policy determinations to be made by the Board. Even if the Board's record had been before the court, it would not be the court's business to fix boundaries, as urged by the petitioners. The effect of the Board's order was to fix the boundaries then existing, and no change in these boundaries would in any way affect the boundaries of the proposed Community College District. The argument about boundaries is specious. The lawful exercise of express statutory powers is not arbitrary.

In School District No. 17 v. Powell, 1955, in reference to the exercise of authority committed to a district school board, we held that "Courts can interfere only when the board refuses to exercise its authority or pursues some unauthorized course. The wisdom or expediency of an act, or the motive with which it was done, is not open to judicial inquiry or consideration where power to do it existed."

With respect to the claim that the proceedings were void because only one member of the Board was present at the hearing, we read the language of Donohoe and Randall and of our own statute to mean that the irregularity alleged must be one of an arbitrary or capricious action or one which would, if true, tend to invalidate the proceeding. It was not intended to apply to innocuous irregularities that could in no event affect the ultimate validity of the proceedings.

To the extent that the petition alleges an irregularity, it was a trivial one at best. Furthermore, the act of presiding at the meeting was in no way related to the ultimate action of the Board. This was not a decision-reaching hearing, merely a "speech-making" one. The Board's order, which is the only record properly before us, recites full performance of the functions by the statute.

Accordingly, we hold that we will not remand the case for the proceeding provided by ORS. 183.480, but will recognize, sua sponte, the failure of the petition to allege any grounds for review as provided by the statute. The case is remanded with directions to dismiss the petition.

*"The basic principle is that the legislature has the power to enact any law not prohibited by the federal or state constitution and does not prohibit the legislature from authorizing a junior college district overlying a separate tax."*

## THREE RIVERS JUNIOR COLLEGE DISTRICT OF POPLAR BLUFF v. THE HONORABLE W. O. STATLER

421 S.W. 2d 235 (1967)
Decided by The Supreme Court of Missouri

**The Three Rivers Junior College District of Poplar Bluff, Missouri, was organized in 1966. Its territory comprises all of Butler, Carter, Ripley, and Wayne Counties and small parts of four additional counties. The Junior College District imposed a tax of forty cents on the one hundred dollar assessed valuation in the district. Resident taxpayers in Carter, Ripley, and Wayne Counties filed separate suits to enjoin their respective county clerks and collectors from extending the tax levy on the tax books and collecting it, on the grounds that the levy was unlawful for two reasons: (1) the forty cents levy, when added to other levies by other school districts in the representative counties and the Junior College District, exceeded the constitutional limit on levies by school districts prescribed in Article X, Section II(b), 1945 Constitution, V.A.M.S., and (2) the Junior College District was illegally formed.**

**The suits were consolidated and the respondent judge enjoined the defendants from extending or collecting the taxes "for Junior College purposes in any school district where the total levy, including the forty cent levy for Junior College District purposes exceeds the limitations set out in Article X, Section II of the Constitution of Missouri." The order was stayed to give relators time to file a petition for writ of prohibition. A provisional rule was issued and the case was to determine whether to make the rule permanent or to abolish it.**

✓ 58

JUDGE SEILER delivered the opinion of the court.

There can be no serious question of the power of the legislature to authorize organization of junior college districts providing instruction for high school graduates.

The real question is whether the 1945 Constitution prohibits the legislature from giving the Junior College District power to levy a tax as provided by Section 178.870, RSMo 1965 Supp., V.A.M.S., the applicable part of which provides as follows:

> Any tax imposed on property subject to the taxing power of the junior college district under Article X, Section II(a) of the Constitution without voter approval shall not exceed forty cents on the hundred dollars assessed valuation in districts having less than one hundred million dollars assessed valuation.

What it comes down to, therefore, is whether the portions of Article X, Section II(b), which refer to school districts, mean that each school district is authorized to levy the full amount stated, even though there may be more than one layer of school districts covering a given territory, or whether all the school districts in a given area combined must stay within the limit specified.

If the words "For school districts formed of cities and towns" and "For all other school districts" used in Section II(b), Article X, mean for school districts collectively as the respondent, in effect, contends, these would be some of the consequences:

> Here the junior college district overlaps several different public school districts. Obviously, each one of these districts will not have the same tax rate. If the junior college district can only levy to that amount remaining after the individual public school district levy for the area is subtracted from the limit, then the junior college district would be levying a different tax rate in the various public school districts making up the junior college district, and this would be violative of Section 3, Article X, of the 1945 Constitution requiring uniformity upon the same class of subjects within the territorial limits of the taxing authority.

> There would be a never-ending race between the junior college district and the local school districts over which could obtain priority on tax levies. School boards would be faced with an impossible task in preparing their annual estimates of the amount of money to be raised by taxation for the ensuing school year.

A constitutional provision should never be given a construction which would work such confusion and mischief unless no other reasonable construction is possible. (State ex rel. Moore v. Toberman, banc, 363 Mo. 245, 250 S.W. 2d 701, 705; State ex rel. and to use of Jamison v. St. Louis-San Franciso R. Co., banc, 318 Mo. 285, 300 S. W. 274, 277.)

The fact is that there is nothing in the 1945 Constitution prohibiting junior college districts, with a tax levy by each one, although historically there has not been a broad system of overlying school districts in Missouri. But times and needs change, and present-day educational demands are such that some overlapping of school districts is inevitable if education beyond the high school level is to keep up with the need and the demand.

There has always been some overlapping of geographical limits of counties and cities, so that many resident taxpayers pay two taxes in the same area. This was handled by the 1945 Constitution spelling out the limits for the counties and cities. The possibility of overlapping or overlying school districts and levies was present when the 1945 Constitution was adopted, but nothing was done to prohibit each school district from levying taxes or to limit collectively the amount of overlying taxes. In our opinion, this language does not prohibit the legislature from authorizing a junior college district overlying a separate tax as set forth in Sec. 178.870, and we return to the basic principle mentioned earlier that the General Assembly, unless restrained by the Constitution, is vested in its representative capacity with all the primary power of the people and that legislature has the power to enact any law not prohibited by the federal or state constitution. We therefore hold that the respondent was in error in holding that the 40 cents levy, when added to the other levies by other school districts in the respective counties and the junior college district, exceeds the constitutional limitation on levies by school districts prescribed by Section II(b), Article X of the 1945 Constitution. Whether the junior college district levy exceeds the constitutional limitation must be determined by the size of its levy alone.

As to the respondent's final contention that the junior college district was illegally formed, such a challenge as here attempted cannot be maintained by county resident taxpayers by way of an injunction suit, but only quo warranto, as decided in State ex rel. Junior College District of Sedalia v. Barker (Mo. Sup. banc, 418 S. W. 2d 62).

The provisional rule is therefore made absolute.

All concur.

*"The law is settled that when a public body has assumed to exercise the powers of a public corporation of a kind recognized by law, so as to become at least a de facto corporation, the validity of its organization can be challenged only by direct proceedings in quo warranto."*

## STATE OF MISSOURI ex. rel. JUNIOR COLLEGE DISTRICT OF SEDALIA v. THE HONORABLE CHARLES V. BARKER, JUDGE

418 S.W. 2d 62 (1967)

**On May 6, 1966, the State Board issued an order establishing the Junior College District of Sedalia, Missouri, which consisted of parts of Benton and Pettis Counties. Prior to the order, petitions were received from voters of the District in each county. The Board determined that the proposed district met the standards established for junior college districts, and an election was held in which the district was approved.**

**A petition to review the evidence relating to the acceptability of the district was presented to the Board, but the request for the hearing was denied. Subsequently, the plaintiffs filed suit for a declaratory judgment and injunction. They contested the correct application of rules governing the formation of the district, the validity of the delegation of power by the General Assembly to the Board, that the regulations and standards established by the Board were arbitrary and unreasonable. It was further alleged that the proposal to form the district should have been submitted to the Missouri Commission on Higher Education, and that the Board did not follow relevant statutes and rules in approving the district. The plaintiffs asked that the trustees be enjoined from further informing, organizing or operating the district. The circuit court issued a temporary order restraining the trustees from further action. The trustees and Board contested the jurisdiction of the court, and were overruled.**

JUDGE HENLEY delivered the opinion of the court.

This is an original proceeding in prohibition to prevent the respondent from exercising jurisdiction.

The relators' first and main point is that the court has exceeded its jurisdiction by granting an injunction and is without jurisdiction to grant the relief prayed, because the District is a public corporation, the legality of the formation and existence of which, may not be challenged by individuals as plaintiffs by declaratory judgment action, injunction or petition for review, but may be challenged by the State only by quo warranto, a direct proceeding instituted for that purpose.

The respondents' return to the provisional rule admits the detailed steps taken and the procedure followed pursuant to 178.800 to effect the organization of the District; relators and respondent have stipulated to facts showing an assumption of corporate powers by the District and its trustees. We conclude from this record that the District is a public corporation, Subsection 2 of 178.770, having at least a de facto existence.

The law is settled that when a public body has, under color of authority, assumed to exercise the powers of a public corporation of a kind recognized by law, so as to become at least a de facto corporation, the validity of its organization can be challenged only by direct proceedings in quo warranto by the State through its officers designated in 531.010, and cannot be challenged by individuals.

We hold that individual plaintiffs may not maintain an action attacking the validity of a public corporation by way of a petition for review.

The plaintiffs' petition states no claim for relief to which plaintiffs are entitled, and none can be stated by them. The respondent exceeded his jurisdiction in granting the temporary injunction and, for the reasons stated, is without jurisdiction to further entertain the action.

In support of his contention that relators' petition for the writ of prohibition is barred by laches, respondent cites State ex rel. Nineteenth Hole, Inc. v. Marion Superior Court et al., 243 Ind. 604, 189 N. E. 2d 421. He cites no Missouri cases or other authority. We have read this cited case; it is not applicable to the facts in this case. We find no authority, pro or con, on this proposition. We are not impressed with the respondents' contention, and, while relators' petition for the writ could have been filed earlier, under the circumstances of this case we are not inclined to hold that the petition is barred by laches, and decline to do so.

The provisional rule in prohibition is made absolute.

All concur.

*"The Junior College Act is constitutional."*

## PEOPLE OF THE STATE OF ILLINOIS v. FRANCIS et al.

Decided by The Supreme Court of Illinois (1968)

JUDGE CARDOSI presided onver this court.

A friendly suit was filed in the Kankakee County Circuit Court of Illinois to establish the constitutionality of the Junior College Act of Illinois (Public Junior College Act; Chapter 122, Section 101-1 to Section 108-2, Illinois Revised Statutes 1967). Prior to this suit a group of residents had announced their intention to file such a suit after their petition to detach from a junior college district was denied by the State of Illinois Junior College Board. Their petition to file suit was still pending July 4, 1968. As a consequence of these actions, a bond issue to finance junior college construction was halted. The suit was appealed to the Supreme Court of Illinois.

The adversary group filed a brief as amici curiae (June 17, 1968), contending that a trial of the suit on a non-adversary basis would foreclose consideration of the invalidity of the Junior College Act, as outlined in their arguments. They asserted:

(1) The public junior college act is unconstitutional since when the state grants administrative review under a particular section it must do so in a consistent and uniform manner.

(2) The public junior college act is unconstitutional in that the provisions for an organizational election and for an election of board members violate the one man, one vote requirement of the Federal Constitution and the requirement of free and equal elections and freedom from special laws of the Illinois Constitution.

(3) The Illinois public junior college system is by constitutional mandate part of the common school system of the state.

(4) The public junior college act is unconstitutional in that it authorizes and fosters a system supported by state funds which does not serve the entire state and which provides unequal educational facilities and opportunities between those areas which it does serve.
(5) The public junior college act is unconstitutional in that funds for building programs collected state-wide are denied to some Class I and all Class II junior colleges on the basis of criteria bearing no relation to educational purpose and are distributed to some Class I junior colleges upon unconstitutional standards.
(6) The public junior college act which contains inseparable, unconstitutional provisions for the genesis, organization, administration and financing of junior colleges is unconstitutional as a whole.

The Supreme Court of the State of Illinois ruled on July 3, 1968, that the Junior College Act was constitutional in the friendly suit. The adversary group filed a petition for rehearing as amici curiae on July 21, 1968. They asserted that the court, in its decision, had not addressed the various constitutional questions which they had raised.

Related cases:
Board of Education of Gardener School District No. 112 v. County Board of School Trustees, 28 Ill 2d 15, 191 N.E. 2d 65
Dusch v. Davis, 387 U.S. 112 (1967)

## HADLEY et al. v. JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY, MISSOURI, et al.

Decided by The Supreme Court of The United States (1970)

JUSTICE BLACK delivered the opinion of the court.

This case involves the extent to which the Fourteenth Amendment of the U. S. Constitution and the "one man, one vote" principle applies in the election of local governmental officials. Appellants are residents and taxpayers of the Kansas City School District, one of eight separate school districts that have combined to form the Junior College District of Metropolitan Kansas City. Under Missouri law, separate school districts may vote by referendum to establish a consolidated junior college district and elect six trustees to conduct and manage the necessary affairs of that district.[1] The state law also provides that these trustees shall be apportioned among the separate school districts on the basis of "school enumeration," defined as the number of persons between the ages of six and twenty years, who reside in each district.[2] In the case of the Kansas City School District, this apportionment plan results in the election of three trustees, or 50% of the total number, from that district. Since that district contains approximately 60% of the total school enumeration in the junior college district,[3] appellants brought suit claiming that their right to vote for trustees was being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment. The Missouri Supreme Court upheld the trial court's dismissal of the suit, stating that the "one man, one vote" principle was not applicable in this case (432 S.W. 2d 328). We noted probable jurisdiction of the appeal (393 U. S. 1115, 1969), and for the reasons set forth below we reverse and hold that the Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner which does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district.

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[1] Mo. Ann. Stat. 178.800, 178.820 (1965).

[2] Ibid., 167.011 (1965).

[3] For the years 1963 through 1967, the actual enumeration in the Kansas City School District varied between 63.55% and 59.49%. App., at 38.

In Wesberry v. Sanders (376 U. S. 1, 1964), we held that the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (Id., at 7-8) In Reynolds v. Sims (377 U. S. 533, 1964), and the companion cases,[1] we considered state laws which had apportioned state legislatures in a way that again showed glaring discrepancies in the number of people who lived in different legislative districts. Applying the basic principle of Wesberry, we therefore held that the various state apportionment schemes denied some voters the right guaranteed by the Fourteenth Amendment to have their votes given the same weight as that of other voters. Finally, in Avery v. Midland County (390 U. S. 474, 1968), we applied this same principle to the election of Texas county commissioners, holding that a qualified voter in a local election also has a constitutional right to have his vote counted with substantially the same weight as that of any other voter in a case where the elected officials exercised "general governmental powers over the entire geographic area served by the body." (Id., at 485)

Appellants in this case argue that the junior college trustees exercised general governmental powers over the entire district and that under Avery the State was thus required to apportion the trustees according to population on an equal basis, as far as practicable. Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college,[1] their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in Avery.

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[1] WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Committee v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964).

This Court has consistently held in a long series of cases,[2] that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions. Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor - these officials are elected by popular vote.

It has also been urged that we distinguish for apportionment purposes between elections for "legislative" officials and those for "administrative" officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities "cannot easily be classified in the neat categories favoried by civics texts," and it must also be rejected. We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.

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[1] Mo. Ann. Stat. 167.161, 177.031, 177.011, 177.041, 178.770, 178.850-178.890 (1965).

[2] Wesberry, supra; Reynolds, supra; cases cited n. 4, supra; Avery, supra; Gray v. Sanders, 372 U.S. 368 (1963); Burns v. Richardson, 384 U.S. 73 (1966); Swann v. Adams, 385 U.S. 440 (1967).

In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme which required that candidates be residents of certain districts which did not contain equal numbers of people (Dusch v. Davis, 387 U. S., 112, 1967). Since all the officials in that case were elected at large, the right of each voter was given equal treatment.[1] We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not "represent" the same number of people does not deny those people equal protection of the laws (Sailors v. Bd. of Education, 387, U. S. 105, 1967; cf. Fortson v. Morris, 385, U. S. 231, 1966). And a State may, in certain cases, limit the right to vote to a particular group or class of people. As we said before, "viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." But once a state has decided to use the process of popular election and "once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded" (Gray v. Sanders, 372 U. S. 368, 381, 1963).

For the reasons set forth above the judgment below is reversed and the case is remanded to the Missouri Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

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[1] The statute involved in this case provides that trustees who are elected from component districts rather than at large must be residents of the district from which they are elected. Mo. Ann. Stat. 178.820 (2) (1965).

JUSTICE HARLAN delivered the dissenting opinion.

Today's decision demonstrates, to a degree that no other case has, the pervasiveness of the federal judicial intrusion into state electoral processes that was unleashed by the "one man, one vote" rule of Reynolds v. Sims.

Four years later, in Avery v. Midland County, the "one man, one vote" rule was extended to many kinds of local governmental units, thereby affecting to an unknown extent the organizational integrity of some 80,000 such units throughout the country, and constricting the States in the use of the electoral process in the establishment of new ones.

And today, the Court holds the "one man, one vote" rule applicable to the various boards of trustees of Missouri's junior college system, and forebodes, if indeed the case does not decide, that the rule is to be applied to every elective public body, no matter what its nature. I therefore dissent, taking off from Avery in what is about to be said.

In Avery the Court acknowledged that "the States' varied, pragmatic approach in establishing governments" has produced "a staggering number" of local governmental units. The Midland County Commissioners Court, the body whose composition was challenged in Avery, was found to possess a broad range of powers that made it "representative of most of the general governing bodies of American cities, counties, towns, and villages," and the Court was at pains to limit its holding to such general bodies. Today the Court discards that limitation, stating that "there is no discernible valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election." I believe, to the contrary, that the need to preserve flexibility in the design of local governmental units that serve specialized functions, and must meet particular local conditions, furnishes a powerful reason to refuse to extend the Avery ruling beyond its original limits. If local units having general governmental powers are to be considered, like state legislatures, as having a substantial identity of function that justifies imposing on them a uniformity of elective structure, it is clear that specialized local entities are characterized by precisely the opposite of such identity. From irrigation districts to air pollution control agencies to school districts, such units vary in the magnitude of their impact upon various constituencies and in the manner in which the benefits and burdens of their operations interact with other elements of the local political and economic picture. Today's ruling will forbid these agencies from adopting electoral mechanisms that take these variations into account.

In my opinion, this ruling imposes an arbitrary limitation on the ways in which local agencies may be constituted. Since the Court recognizes the States' need for flexibility in structuring local units, I am unable to see any basis for its selectively denying to them one of the means to achieve such flexibility. If, as the Court speculates, other means will prove as effective as apportionment in the adaptation of local agencies to meet specific needs, presumably those other means will also enable the States just as effectively to accomplish whatever evils the Court thinks it is preventing by today's decision. The Court has not shown that, under the supervision of state legislatures that are apportioned according to Reynolds, flexible methods of apportionment of local official bodies carry any greater danger of abuse than these other means of achieving the desirable goal of specialization. The Court's imposition of this arbitrary limitation on the States can be justified only in the name of mathematical nicety.

If the Court adhered to the Avery line, marginal cases would of course arise in which the courts would face difficulty in determining whether a particular entity exercised general governmental powers, but such a determination would be no different in kind from many other matters of degree upon which courts must continually pass. The importance of ensuring flexibility in the organization of specialized units of government, and the uncertainty whether the rule announced today will further any important countervailing interest, convince me that the Court should not proceed further into the political thicket than it has already gone in Avery.

The facts of this case afford a clear indication of the extent to which state objectives are to be sacrificed on the altar of numerical equality. We are not faced with an apportionment scheme that is a historical relic, with no present-day justification, or one that reflects the stranglehold of a particular group that, having once attained power, blindly resists a redistribution. The structure of the Junior College District of Metropolitan Kansas City is based upon a state statute enacted in 1961. Prior to that date, the individual school boards had the power to create their own junior colleges, as they still do, but there was apparently no authorization for cooperation among districts. The 1961 statute was enacted out of concern on the part of the legislature that Missouri's public educational facilities were not expanding at a satisfactory rate (See Three Rivers Junior College District v. Statler, 421 S.W. 2d 237, Mo. 1967).[1] The provisions of the statute evidence a legislative determination of the most effective means to encourage expansions through cooperation between districts.

In recognition of the fact that individual school districts may lack the funds or the population to support a junior college of their own, the state legislature has authorized them to make voluntary arrangements with their neighbors for joint formation of a junior college district. If one of the cooperating school districts greatly preponderates in size, it enters into the arrangement knowing that its representation on the board of trustees, while large, will be somewhat smaller than it would be if based strictly on relative school enumeration.

The features of this system are surely sensibly designed to facilitate creation of new educational bodies while guaranteeing to small school districts that they will not be entirely swallowed up by a large partner. The small districts are free to void alliance with a highly populated neighbor, if they prefer to link with enough others of their own size to provide a viable base for a junior college. At the same time, a very large school district is probably capable of forming a junior college on its own if it prefers not to consolidate, on the terms set by statute, with smaller neighbors. On the other hand, large and small districts may work together if they find this the most beneficial arrangement.[1] The participation, as here, of one larger and seven smaller school districts in the joint formation of a junior college district, represents a pragmatic choice by all concerned from among a number of possible courses of action.

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[1] Counsel for appellees informed the Court at oral argument that prior to the passage of this statute, when the law merely authorized each school district in the State to establish its own junior college, there were only seven such junior colleges, with a total enrollment of approximately 5,000 students. Today there are 12 junior college districts, in which nearly 120 individual school districts participate, with a total enrollment of over 30,000 students.

The system struck down today shares much of this same character of voluntary compromise. It is true that the analogy would be even closer if the legislature had left the school districts free to negotiate their own apportionment terms, rather than imposing a uniform scale; but as I read the Court's opinion today, it would strike down the apportionment in this case even if the terms had resulted from an entirely free agreement among the eight school districts. Insistence upon a simplistic mathematical formula as the measure of compliance with the Equal Protection Clause in cases involving the electoral process has resulted in this instance in a total disregard of the salutary purposes underlying the statutory scheme.

Finally, I find particularly perplexing the portion of the Court's opinion explaining why the apportionment involved in this case does not measure up even under the "one man, one vote" dogma. The Court holds that the voters of the Kansas City School District, who elect 50% of the trustees, are denied equal protection of the laws because that district contains about 60% of the school enumeration. This is so because the statutory formula embodies a "built-in discrimination against voters in large districts." The Court seems to suggest that the same discrepancy among districts might pass muster if it could be shown to be mathematically unavoidable in the apportionment of the small number of trustees among the component districts; but the discrepancy is not permissible where it simply reflects the legislature's choice of a means to foster a legitimate state goal. This reasoning seems hard to follow and also disturbing on two scores.

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[1] At the time this suit was filed, nine junior college districts had been formed pursuant to the statutory procedures. Of these, three did not contain a component district large enough to bring into play the factional formula; the remaining six did contain such a district.

First, to apply the rule with such rigor to local governmental units, especially single-function units, is to disregard the characteristics that distinguish such units from state legislatures. As I noted in my dissent in Avery, there is a much smaller danger of abuses through malapportionment in the case of local units because there exist avenues of political redress that are not similarly available to correct malapportionment of state legislatures. Further, as noted above, the greater diversity of functions performed by local governmental units created a greater need for flexibility in their structure. If these considerations are inadequate to stave off the extension of the Reynolds rule to units of local government, they at least provide a persuasive rationale for applying that rule so as to allow local governments much more play in the joints.

Thus, the result of the Court's holding may be that Missouri is forbidden to establish any formula of general application for apportionment of trustees, but must instead provide for the improvisation of an individual apportionment scheme for each junior college district after the contours of the district have been settled. But surely a State could reasonably determine that the mechanics of operating such a system would be so unduly burdensome that it would be better to apportion according to a statewide formula. Would not such considerations justify a conclusion that the statewide formula achieves equality "as far as practicable?"While the Court does not discuss the problem, its invalidation of this statutory formula seems to be based on the premise that such practical considerations, like a State's desire to encourage cooperation among districts, are constitutionally inadequate to justify any divergence from voting "equality."

The Court does not, however, spell out any rationale for concluding that such matters of administrative convenience deserve no weight in determining what is "practicable." Why does the Court not require that the number of trustees be increased from six, in order to reduce the roughness with which equality is approximated? Would a three-man board be unconstitutionally small? Why is the Court willing to accept inequality that derives from a desire to give representation to component school districts, when similar inequality in state legislative districting could probably not be justified by a desire to give representation to counties? If equality cannot be achieved when representation is by component districts, why does the "as far as practicable" standard not require at-large election of trustees? Is there something about these considerations that gives them a status under the Equal Protection Clause that is not possessed by a legislative desire to apportion by a formula of statewide application?

The Court's adoption of a rigid, mathematical rule turns out not to have saved it from having to balance and judge political considerations, concluding that one does merit some weight in an apportionment scheme while another does not. The fact that the courts, rather than the legislatures, now are the final arbiters of such matters will continue, I fear, after the present decision to be the inevitable consequence of the shallow approach to the Equal Protection Clause represented by the "one man, one vote" theory. The Court could at least lessen the disruptive impact of that approach at the local level by approving this relatively minor divergence from strict equality on the ground that the legislature could reasonably have concluded that it was necessary to accomplish legitimate state interests.

I would affirm the judgment of the Supreme Court of Missouri. What our Court has done today seems to me to run far afield of the values embodied in the scheme of government ordained by the Constitution.

CHIEF JUSTICE BURGER delivered a dissenting opinion.

I concur fully in the opinion of Mr. Justice Harlan. I add this comment to emphasize the subjective quality of a doctrine of constitutional law which has as its primary standard "a general rule, (that) whenever a state or local government decides to select persons by popular election...," the Constitution commands that each qualified voter must be given a vote which is equally weighted with the votes cast by all other electors.

The failure to provide guidelines for determining when the Court's "general rule" is to be applied is exacerbated when the Court implies that the stringent standards of "mathematical exactitude" which are controlling in apportionment of federal congressional districts need not be applied to smaller specialized districts such as the junior college district in this case.

Ultimately, only this Court can finally apply these "general rules" but in the interim all other judges must speculate as best they can when and how to apply them: with all deference I suggest the Court's opinion today fails to give any meaningful guidelines.

*"The Sherman Act is not applicable to Middle States' conduct...It has long been settled that not every form of combination or conspiracy that restrains trade falls within its ambit."*

## MARJORIE WEBSTER JUNIOR COLLEGE, INC. v. MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.

Decided by The United States Court of Appeals (1970)

CHIEF JUDGE BAZELON delivered the opinion of the court.

Middle States Association of Colleges and Secondary Schools, Inc., is a voluntary nonprofit educational corporation, the successor to an unincorporated association of the same name established in 1887. Its general purposes are to aid and encourage the development of quality in secondary schools and institutions of higher education located within its geographical domain (New York, New Jersey, Pennsylvania, Delaware, Maryland, and the District of Columbia) or outside of the continental United States. Chief among its activities is that of accrediting member institutions and applicants for membership. Marjorie Webster Junior College, Inc., is a proprietary junior college for women located in the District of Columbia. In 1966, it applied to Middle States for accreditation. Relying upon a policy statement of the Federation of Regional Accrediting Commissions of Higher Education, and upon its own past practice,[1] Middle States refused to consider Marjorie Webster for accreditation because the latter was not a "nonprofit organization with a governing board representing the public interest." Following the refusal, Marjorie Webster brought suit to compel its consideration for accreditation without regard to its proprietary character. The District Court found Middle States' refusal to consider proprietary institutions of higher education for accreditation a violation of "3" of the Sherman Act and of the developing common law regarding exclusion from membership in private associations; in addition, it found that Middle States' activities in the field of accreditation were sufficiently under the aegis of the Federal Government as to make possible the limitations of the Due Process Clause; and that to deny accreditation to all proprietary institutions solely by reason of their proprietary character was arbitrary and unreasonable, in violation of the Fifth Amendment. Concluding, finally, that continued denial of consideration for accreditation would result in irreparable injury to Marjorie Webster, the District Court enjoined Middle States from denying Marjorie Webster accreditation solely because of its proprietary character, and ordered it to accredit Marjorie Webster if it should otherwise qualify for accreditation under Middle States' standards.[1] On the application of Middle States, we stayed the District Court's order pending our determination of this appeal. For the reasons hereafter set forth, we conclude that the Sherman Act is not applicable to Middle States' conduct as indicated by the present record; that the circumstances are not such to warrant judicial interference with the accreditation and membership policies of Middle States; and that, assuming the Due Process Clause is applicable, Marjorie Webster has not sustained its burden of showing the irrationality of the policy in question as applied to bar consideration of Marjorie Webster for accreditation. Accordingly, we reverse the judgment of the District Court.

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[1] Middle States has never accredited or evaluated a proprietary institution of higher education. This restriction has been explicit since at least 1928. Middle States, however, has accredited three proprietary secondary schools and continues to do so.

Despite the broad wording of the Sherman Act, it has long been settled that not every form of combination or conspiracy that restrains trade falls within its ambit.

That appellant's objectives, both in its formation and in the development and application of the restriction here at issue, are not commercial, is not in dispute. Of course, when a given activity falls within the scope of the Sherman Act, a lack of predatory intent is not conclusive on the question of its legality. But the proscriptions of the Sherman Act were "tailored...for the business world," not for the noncommercial aspects of the liberal arts and the learned professions.[2]

[1] Marjorie Webster Junior College, Inc., v. Middle States Association of Colleges and Secondary Schools, Inc., 302 F. Supp. 459 (D. D. C. 1969).

[2] Compare Greene v. Howard University, 134 U.S. App. D. C. 81, 88 412 F. 2d 1128, 1135 (1969).

We are fortified in this conclusion by the historic reluctance of Congress to exercise control in educational matters...Absent such motives, however, the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself. We do not believe that Congress intended this concept to be molded by the policies underlying the Sherman Act.

Accreditation, as carried out by appellant, is as involved with educational philosophy as with yardsticks to measure the "quality" of education provided. As found by the trial court,

> (Appellant) seeks to determine in broad qualitative terms whether an institution has clearly defined appropriate objectives, whether it has established conditions under which it can reasonably be expected to obtain them, and whether it appears to be obtaining them. Under this criterion, Middle States, in its publication, "The Nature of the Middle States Evaluation," notes that "organization, administration, facilities, and resources are not important in themselves." Accreditation means that the institution has achieved quality within the context of its own aims and program...not that such institution is more qualified than any other accredited or unaccredited institution.[1]

The court added that when the institution is itself responsible in large part for setting the measure by which it is to be judged, we do not think it has been shown to be unreasonable for the appellant to conclude that the desire for personal profit might influence educational goals in subtle ways difficult to detect but destructive, in the long run, of the atmosphere of academic inquiry which perhaps, even more than any quantitative measure of educational quality, appellant's standards for accreditation seek to foster.

We do not conclude, nor does appellant even suggest, that competition from proprietary institutions is anything but wholesome for the nonprofit educational establishment. We merely find that, so far as can be discerned from the present record, appellant does not wield such monopoly power over the operation of educational institutions that its standards for accreditation may be subject to plenary judicial review; and that in light of the substantial latitude that must accordingly be allowed appellant in setting its criteria for accreditation, appellee's exclusion solely on the basis of its proprietary character is not beyond the bounds of appellant's allowable discretion.

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[1] 302 F. Supp. at 474.

What has been said above should also dispose of so much of appellee's agrument as is based upon the Due Process Clause. We may assume, without deciding, that either the nature of appellant's activities or the federal recognition which they are awarded renders them state action subject to the limitations of the Fifth Amendment.

Reversed.

## GLOSSARY

AD VALOREM According to value; the term ad valorem tax means a tax or duty upon the value of the article or thing subject to taxation. Duties are either ad valorem or specific, the former when the duty is laid in the form of a percentage on the value of the property.

AMICUS CURIAE Friend of the court; a by-stander who interposes and volunteers information upon some matter of law in regard to which the judge is doubtful or mistaken.

BANC Bench; the full bench or full court. A "sitting in banc" is a meeting of all judges of a court.

CHANCERY Equity; equitable jurisdiction; the system of jurisprudence administered in courts of equity.

DEMURRER In equity; an allegation of a defendant, which admitting the matters of fact alleged by a bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer. Demurrers are classified as general, special, speaking and parol (not properly a demurrer at all) which is a staying of pleadings.

ENJOIN To require, command; to require a person, by writ of injunction from a court of equity, to perform, or to abstain or desist, from some act.

LACHES Principally a question of inequity of permitting claim to be enforced.

PARI MATERIA Of the same matter; on the same subject; as laws, pari materia must be construed with reference to each other.

PER CURIAM By the court; a phrase used to distinguish an opinion of the whole court from an opinion written by any one judge.

QUO WARRANTO A writ commanding the defendant to show by what warrant he exercised a franchise as used in old English practice; in modern practice, it is intended to prevent exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising such powers. This writ, in effect, is a civil remedy similar to the old writ, and is the method now usually employed for trying the title to a corporate or other franchise, or to a public or corporate office.

RELATOR An informer; the person upon whose complaint, or at whose instance certain writs are issued, and who is quasi the plaintiff in a proceeding.

SUA SPONTE Of his or its own will or motion, voluntarily, without prompting or suggestion.

SUPRA Above; upon this word occurring by itself in a book refers the reader to a previous part of a book, like "ante."

TORT A private or civil wrong or injury; a wrong independent of contract.

WRIT OF INJUNCTION A prohibitive writ issued by a court of equity forbidding a party to do some act, or to permit his servants or agents to do some act.

WRIT OF MANDAMUS This writ commands the performance of a particular act therein specified, and directs the restoration of the complaintant to rights or privileges of which he has been illegally deprived.

WRIT OF PROHIBITION The name of writ issued by a superior court, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally (or some collateral matter arising therein) does not belong to that jurisdiction, but to the cognizance of some other court.

Black's Law Dictionary: Revised Fourth Edition, West Publishing Company, St. Paul, Minnesota, 1968

# LEGAL ASPECTS CONCERNING FINANCE AND TAXATION

## TABLE OF CONTENTS PART II

PREFACE

INTRODUCTION

This part of The Junior College and the Courts summarizes cases related to the legal problems of taxation, tax exemption, and general finance.

III. COURT DECISIONS

1. Chez, as Attorney General, and ex rel. Weber College et al. v. Utah State Building Commission, et al.
   74 P. 2d 687 (1937) Utah

   In this action, the plaintiffs pray for a writ of mandamus to the Utah State Building Commission commanding it to proceed with the construction of the Carbon Junior College and Weber College.

2. Schuler v. Beezley et al.
   13 N.E. 2d 115 (1938)

   This proceeding enjoins the defendants from entering into a contract to purchase a library and certain laboratory equipment from the Oak Park Junior College.

3. District of Columbia v. Mt. Vernon Seminary
   100 F. 2d 116 (1938) District of Columbia

   This suit by the Mt. Vernon Seminary, a private school for girls, sought to recover from the District of Columbia the amount of taxes and penalties assessed against the plaintiff's real and personal property and paid under protest. The case was based on the construction to be placed on the words "private gain" relating to the exemption of taxation for educational institutions.

4. City of Detroit et al. v. Detroit Commercial College
   33 N.W. 2d 737 (1948) Michigan

   The Detroit Commercial College, a non-profit educational corporation, sued the City of Detroit claiming tax exemption under statute provisions exempting the personal property of benevolent, charitable, educational, and scientific institutions incorporated under laws of the State.

5. Troy Conference Academy and Green Mountain Junior College v. Town of Poultney et al.
66 A. 2d 2 (1949)

This suit sought to restrain the defendants from assessing or collecting any future taxes with respect to a faculty residence owned by the plaintiff and to require repayment of taxes for the year 1945, which had been paid under protest. The plaintiff claimed tax exemption under sections of its charter.

6. Concordia Collegiate Institute v. Miller
93 N.E. 2d 632 (1950)

This proceeding asked for a mandamus order directing the Superintendent of Buildings of the Village of Bronxville to disregard a building zone ordinance and issue a permit for the erection of a library, science building, and auditorium by the Institute.

7. Jerold L. Wood v. Boise Junior College Dormitory Housing Commission
342 P. 2d 700 (1959) Idaho

The purpose of this action was to secure a final expression of the court as to the constitutional validity of statutes authorizing the Housing Commission to issue bonds and other evidence of obligations.

8. H. L. Gogerty v. Coachella Valley Junior College District
21 Cal. Rptr. 806, 371 P. 2d 582 (1962) California

The plaintiff sought to enjoin the Junior College District from acquiring a tract of land, located near an airport, for the site of the Junior College.

9. Albert C. Arthur v. Oceanside-Carlsbad Junior College District et al.
31 Cal Rptr. 177 (1963) California

Injunctive and declaratory relief against the Junior College District with respect to selection of a junior college site by the Board of Trustees was prayed in this action.

10. University Circle Development Foundation v. Auditor of Cuyahoga County
190 N.E. 2d 691 (1963) New York

In this proceeding, an appeal is made from a decision of the Board of Tax Appeals denying tax exempt status for property acquired by the private non-profit foundation to be used to provide open areas, pedestrian ways, and breathing space for institutions in the area.

11. Ralph Meyer v. Bernard Wiess
263 N.Y.S. 2d 813 (1965) New York

A taxpayer asked for a declaratory judgment as to whether the the community college board or the county board had the power to make final determination of a site for a community college.

12. Sawyer et al. v. Board of Regents of Clarendon Junior College et al.
393 S.W. 2d 391 (1965)

This appeal is a consolidation of two cases filed in the trial court. The first contested an election called for the purpose of determining whether the Board should have the power to levy and collect an ad valorem tax for the maintenance of the college. The second contested the same election and sought an injunction to prohibit the defendants from giving effect to the election by levying, assessing, or collecting taxes authorized by the election.

13. West Valley Joint Junior College District of Santa Clara County v. Timpany
408 P. 2d 113 (1965)

This action sought to compel the County Superintendent of Schools to take certain actions with respect to the District's funds in regard to interdistrict attendance agreements.

14. Paducah Junior College v. Secretary of Health, Education, and Welfare
225 F. Supp. 147 (1966) Kentucky

This proceeding asked for judicial review of a final administrative determination of the United States Commissioner of Education, Department of Health, Education, and Welfare, denying application for a grant of Federal funds under the Higher Education Facilities Act of 1963.

15. C. E. Montague, Jr., Individually, etc. v. Board of Education of Ashland Independent School District, etc. et al.
402 S.W. 2d 94 (1966) Kentucky

A proceeding was brought by the taxpayers against the Board of Education to determine the validity of agreements with the University of Kentucky to operate a junior college owned by the Board and to determine the necessity to continue to collect a special tax to support the junior college.

16. People ex. rel. Board of Education of Junior College School District No. 300 et al. v. Collins, Secretary
217 N.E. 2d 1 (1966)

This original writ of mandamus was filed by the petitioner to compel the Secretary to sign certain bonds sold by the Triton Junior College District. The issue in dispute is the effect of the Public Junior College Act on bonds voted by the junior college prior to the enactment of the Act.

17. Arizona State Board of Directors for Junior Colleges v. Phoenix Union High School District of Maricopa County
424 P. 2d 819 (1967) Arizona

A high school district sought a declaration of the district's right to receive state aid under certain Arizona statutes.

# LEGAL ASPECTS CONCERNING FACULTY AND STUDENTS

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I. PREFACE

II. INTRODUCTION

This part of The Junior College and the Courts summarizes cases related to faculty employment, dismissal and salaries, and cases involving civil rights, torts and contracts related to students in junior colleges.

III. COURT DECISIONS

A. Faculty

1. Randolph Junior College v. Isaacks
113 S.W. 2d 628 (1938) Texas

In this case, a teacher who was also a member of the board of trustees sued the college for an unpaid salary that was due under contract. The college contended that the contract was not valid because the teacher had participated in the vote that raised his salary.

2. Board of Trustees of the Contra Costa Junior College District v. Schuyten
329 P. 2d 223 (1958) California

The judgment of the Superior Court of Contra Costa County discharging two teachers on the grounds that they refused to answer questions about their un-American activities is appealed in this case.

3. Baseman et al., v. Remy et al., Marin Junior College Board of Trustees
325 P. Rptr. 2d 578 (1958) California

In this action, the College appealed a Superior Court judgment that six teachers with permanent status, discharged when the college discontinued a program that it was holding in San Quentin Prison, should be reassigned as classroom teachers and given their unpaid salaries.

4. Barnes v. Mt. San Antonio College
   32 Cal Rptr. 609 (1963) California

This action studies whether or not a college, once it has recognized for salary purposes teachers' advanced degrees without regard to accreditation of the institution from which the degrees were earned, could later reduce such teachers' salary ratings by refusing any longer to recognize the degrees in question.

5. Governing Board of Fullerton Junior College District of Orange County v. Phillips
   41 Cal. Rptr. 608 (1964) California

This is an appeal by an instructor whom the Superior Court of Orange County authorized the Fullerton Junior College Board to dismiss on the grounds that he was a knowing member of the Communist Party and had sworn falsely about his membership.

6. Raney v. Board of Trustees of Coalinga Junior College District
   48 Cal. Rptr. 555 (1966) California

A college's refusal to rehire a teacher who was dismissed for causes related to the welfare of the school and students was appealed by the teacher.

7. Board of Trustees of Mount San Antonio Junior College v. Hartman
   55 Cal. Rptr. (1966) California

In action by a junior college to determine the district's right to discharge a permanent teacher on findings that he had cohabitated with one of his former students, the Superior Court decision that such conduct was immoral and warranted dismissal was appealed.

B. Students

1. Weber v. State
   53 N.Y.S. 2d 598 (1945) New York

This action concerns a student who was injured in a state school while performing class activities, when proper safety precautions had not been taken.

2. Wilson v. City of Paducah
   100 F. Supp. 116 (1951) Kentucky

Several Negro citizens of Paducah, Kentucky, sued the city of Paducah for denying them the right to attend Paducah Junior College because of their race.

3. Wichita Falls Junior College v. Battle
   204 F. 2d 632 (1953) Texas

This action was brought by a group of Negroes against the junior college district for denying them admission.

4. Strank v. Mercy Hospital of Johnstown
   117 A. 2d 697 (1955) Pennsylvania

In this case, a nurse brought action to compel a nursing school to give her credit for the two years of successfully completed academic work.

5. Grover v. San Mateo Junior College District
   303 P. 2d (1956) California

A student, injured through negligence of a pilot who was hired by the college to take students on a flight, brought action in this case.

6. Commonwealth v. Grossman
   146 A. 2d 315 (1958) Pennsylvania

This action centered on whether or not a father is responsible for a son's college support after divorce.

7. Commonwealth v. Howell
   181 A. 2d 903 (1962) Pennsylvania

This case also centers on the question of the obligation of a divorced parent to support the offspring during years of attendance at college.